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SUPREME COURT, U. S.

Nos. 15, 17 and 20.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

ILLINOIS CENTRAL RAILROAD COMPANY, ET AL.,
Appellants,

No. 15. *vs.*

NORFOLK AND WESTERN RAILWAY COMPANY,
ET AL., *Appellees.*

CALUMET HARBOR TERMINALS, INC. AND NORTH PIER TERMINAL COMPANY, *Appellants,*

No. 17. *vs.*

NORFOLK AND WESTERN RAILWAY COMPANY,
ET AL., *Appellees.*

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellants,*

No. 20. *vs.*

NORFOLK AND WESTERN RAILWAY COMPANY,
ET AL., *Appellees.*

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO.

BRIEF FOR APPELLEES.

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September 23, 1966.

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ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO.

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STATUTES INVOLVED.

In addition to the statutes referred to by appellants and reproduced in their appendices, Sections 1(19) and 1(20) of the Interstate Commerce Act, as amended, 49 U. S. C., § 1(19), 1(20), are also involved. They have been reproduced in the Appendix hereto.

QUESTIONS PRESENTED.

The completion of the St. Lawrence Seaway in 1959 was expected to bring a great increase in oceangoing freight to the Great Lakes ports. The Chicago Regional Port District was created to develop a new harbor to serve this traffic at Lake Calumet at the far southern end of the city. This area was served by the Chicago, Rock Island and Pacific Railroad Company and The New York, Chicago and St. Louis Railroad Company ("Nickel Plate"). In 1957, six operating railroads applied for authorization from the Interstate Commerce Commission to serve the harbor. The carriers already serving the area intervened in opposition to the applications. Approval was granted by the Commission, but vacated by the District Court below, in light of the record before it and applicable statutory provisions. The questions presented are:

1. Whether the Court below misunderstood or grossly misapplied the applicable standard of review in concluding that there was neither law nor evidence to support the Interstate Commerce Commission's approval for additional rail service to Lake Calumet port.

2. Whether the Court below was correct in concluding that the denial of a hearing to appellees here by the Interstate Commerce Commission on the additional applications filed by the applicant railroads was contrary to the provisions of the applicable statutes and the constitutional requirement of due process of law; and that without such a hearing there was no evidentiary support for the Commission's orders involved.

STATEMENT OF THE CASE.

I. INTRODUCTION.

This case involves the efforts of six operating railroads* to construct a single line of track for their joint use into the Chicago Regional Port District (hereinafter the "District" or "Lake Calumet port") at Lake Calumet near the southern limits of the City of Chicago. The District is presently served by two railroads, the Chicago, Rock Island and Pacific Railroad Company ("Rock Island") and the Norfolk and Western Railway Company ("Nickel Plate" merged into the Norfolk and Western since these proceedings began). Freight carried by all railroads, including appellants, has ready access to the facilities on the west side of Lake Calumet over the tracks of Rock Island on a nondiscriminatory basis. (R. 277, 303, 306.) Nickel Plate serves the east side of Lake Calumet.

The pending litigation resulted from the filing of applications with the Interstate Commerce Commission in 1957 for certificates of public convenience and necessity to serve the Port District over the proposed single line of track previously mentioned. (R. 265-67.) The appellants predicated their applications upon the anticipated rail traffic that might result from the opening of the St. Lawrence Seaway to large, ocean-going vessels and the ambitious plans of the Port District to develop Lake Calumet in

*Illinois Central Railroad Company (Illinois Central); The Pennsylvania Railroad Company (Pennsylvania); Chicago, South Shore and South Bend Railroad Company (South Shore); The Belt Railway Company of Chicago (Belt); The New York Central Railroad Company (New York Central); and Indiana Harbor Belt Railroad Company (IHB). Non-operating subsidiaries of certain of the above applicants also participated in the proceeding.

expectation of increased waterborne traffic. A full understanding of this litigation requires a brief statement of the history of rail service to Lake Calumet and previous attempts by certain of the appellants to obtain exclusive entrance into the port on their own account.

A. History of Lake Calumet Port.

Lake Calumet port is but one of seven facilities in the total "Port of Chicago" for the handling of waterborne freight. The other facilities are Chicago Harbor (popularly called "Navy Pier"), the main and north branches of the Chicago River, the south branch of the Chicago River, the Chicago Sanitary and Ship Canal, the Calumet-Sag Channel, and the Calumet Harbor and River, none of which are within the jurisdiction or any part of the Chicago Regional Port District. (R. 291.)

Lake Calumet is a shallow lake approximately two miles in length, and occupies roughly 2,250 acres. It is accessible by water only at its southeast corner where it empties into the Calumet River. Water freight traveling to Lake Calumet from Lake Michigan must journey six miles down the Calumet River, passing the port of Calumet Harbor and numerous other facilities on the way. From Lake Calumet, the river proceeds south to its connection with the Illinois Waterway which ultimately joins the Mississippi River. We refer the Court to a map of Lake Calumet which appears in the Transcript of Record at page 1205.

Plans for a deep water port at Lake Calumet were first announced in 1916. (R. 940.) However, it was not until 1955 that the lake and a small amount of adjacent land was acquired from the City of Chicago by the Chicago Regional Port District, a municipal corporation. Since that date, and prior to the Commission's decision in this case, the Port District constructed a dock, three

transit sheds, one warehouse and two grain elevators adjacent to the south end of the lake, partly on filled land and partly on land adjacent to the lake. These facilities were constructed at a cost of $24,000,000, utilizing the proceeds from the sale of revenue bonds. (R. 276-77.)

These facilities occupy approximately ten per cent of the usable area at Lake Calumet port. The developed area is shown in yellow on the map at page 1205 of the Transcript of Record.

The Port District has also built railroad tracks to serve its facilities and a yard containing ten tracks with 300 cars capacity as a port yard. (R. 596; 1018.) The manager of the Port District testified before the Commission that no further yard tracks would be constructed. (R. 597.)

Lake Calumet port is not a public facility. The Port District is merely a promotional, developmental and general supervisory agency. Although it is a municipal corporation, the Port District has no taxing power; all capital improvements depend for financing upon the sale of revenue bonds. (R. 588.)

Lake Calumet facilities are leased to private operators. At the time of hearing before the Commission (1957), the transit sheds were leased to the appellant North Pier Terminal Company (Shed #1), to Packers Terminal and Warehousing Company (Shed #2), and to the appellant Calumet Harbor Terminals (Shed #3), a lessee of the appellant Pennsylvania. Grain elevator #1 was leased to the Illinois Grain Company, and elevator #2 to the Rice Powell organization. The sole warehouse was leased to North Pier Terminal and Calumet Harbor Terminals. (R. 277.) These private shippers on the lake's west side are currently served by Rock Island, while all rail carriers have ready access to Lake Calumet port

through the Rock Island's nondiscriminatory switching services. (R. 273-75; 306.) The applicants, if successful, propose to serve the port by substituting their single switching service for the same service now performed by the Rock Island.

B. History of Rail Service at Lake Calumet.

Between 1877 and 1880, some 4,000 acres of undeveloped land were purchased by one of the Pullman companies. At that time there was no rail service to Lake Calumet, although some industries occupied land to the west and south of the lake.

In 1880, Pullman established a right-of-way for railroad purposes and constructed trackage that, for the first time, brought rail service to Lake Calumet. (R. 935.) Thereafter, first the Michigan Central and then the Kensington & Eastern Railroad Company ("K & E", a wholly owned subsidiary of the Illinois Central) undertook limited service at Lake Calumet by sharing with Pullman the serving of two ice houses. By 1910, the Michigan Central had abandoned its service, was replaced in this function by the K & E, and the full responsibility for serving Lake Calumet devolved upon Pullman when, in 1915, the K & E abandoned its services to the ice houses and removed its tracks. (R. 939.)

After initiating rail service to Lake Calumet industries, Pullman interests formulated extensive plans for developing and serving the Lake Calumet territory. The plans were laid out by Pullman engineers more than fifty years ago. Some 300 to 350 acres of Pullman land had been reserved since 1880 for the development of a harbor. (R. 942.) During the first decade of this century, Pullman gave ten to fifteen acres of land to the United States for development of a turning basin at the inlet to Lake Calumet, and donated

to the City of Chicago real property for ten streets leading to Lake Calumet. (R. 941.)

In 1916, an engineer for the City of Chicago prepared a comprehensive plan for the dredging of Lake Calumet harbor, and the filling of submerged lands with a view toward construction of streets east and west on both sides of the lake. In 1917, Pullman entered into a "Riparian Rights Agreement" with the City whereby it waived riparian rights, without compensation, to some four miles of Lake Calumet shoreline. Subsequently, in 1935, Pullman gave additional property to the United States for the widening of the Calumet River. Pullman also dedicated to the State of Illinois an easement over its property to complete the construction of Doty Avenue, a main arterial highway running north and south along the west side of Lake Calumet. (R. 940-43.)

In 1947, the appellant Illinois Central petitioned the Illinois Commerce Commission for authority to construct a line of track into the Lake Calumet port area. (R. 306.) Pullman and the appellants here, the New York Central and the Belt, appeared in opposition to the application of the Illinois Central. Subsequently, in 1949, Rock Island obtained permission from the Interstate Commerce Commission to acquire the common stock and certain industrial property of Pullman for $2,200,000. (R. 1146-47.) After the acquisition, Rock Island intervened in the Illinois Commerce Commission proceedings in opposition to the Illinois Central's application. The Illinois Central's application was approved by the state Commission but was rejected by the Circuit Court of Cook County and by the Illinois Supreme Court in 1953. *Chicago, Rock Island and Pacific R. R.* v. *Illinois Commerce Comm'n. ex rel. Illinois Central R. R.*, 414 Ill. 134, 111 N. E. 2d 136 (1953). Therein, the court noted that "the industries fringing the area are all served by Pullman" and that none were "served

either by Kensington or by the appellant [Illinois Central]." It ruled against "carriers taking no interest in, or giving no service in, an area pioneered by another carrier who has taken the bitter with the sweet throughout the years." 414 Ill. at 144-45, 111 N. E. 2d at 141.

In 1949, while the Illinois Central's case before the Illinois Commerce Commission was pending, the Interstate Commerce Commission authorized the Rock Island to acquire the common stock and certain properties of Pullman. (R. 306.) Appellants, the Illinois Central and the Belt intervened before the Commission in opposition to the acquisition of Pullman by Rock Island. The Belt urged that the application be denied and that it be permitted to acquire sole control of Pullman. (R. 1157.) The Illinois Central sought to acquire merely the southerly portion of Pullman's trackage (which would thus give it exclusive access to the southwest side of Lake Calumet), and requested an order compelling Rock Island to tender an option to the Illinois Central for that portion within 30 days after approval of the acquisition. (R. 1163.) The Illinois Central contended that its right to serve Lake Calumet directly was derived from the former operations there of its subsidiary K & E. The Commission held that the application of Rock Island would be granted; that the Belt had not demonstrated that its operation or development of the Pullman properties would be superior to, or as good as, that proposed by Rock Island; and noted with respect to the Illinois Central's claim, that its subsidiary, K & E, had performed no services in the district since 1917. (R. 1167-68.)

Approval by the Commission of Rock Island's application to acquire Pullman was made subject to certain conditions designed to guarantee fair practices (hereinafter the "Pullman conditions"). (R. 1168-69.) The Pullman conditions assured nondiscriminatory handling of traffic of

other railroads to and from Lake Calumet, and guaranteed that neutrality of traffic and operating relationships then existing between Pullman and all railroads would continue. Rock Island has adhered strictly to these conditions; the Commission in the present proceeding so found. (R. 306.)

The present case is a continuation of the unsuccessful efforts, mentioned above, by certain appellants to gain access to Lake Calumet and to substitute their joint agent (and joint switching service) for Rock Island's in order to serve industries developed over the years by Rock Island-Pullman.

II. THE PROCEEDINGS BEFORE THE INTERSTATE COMMERCE COMMISSION.

Three successive sets of applications were filed with the Commission by the railroad appellants. (R. 1; 67; 147; 329; 368.) Although the second and third sets of applications had an important bearing on the whole question of the need for additional service at the port and its profitability, Rock Island and Nickel Plate were repeatedly denied an opportunity to be heard with respect to these later applications. (R. 349; 357; 392; 430; 488; 506; 545.)

In the first set of applications, the railroad appellants sought authority to build a single line of trackage and to operate over this track to the entrance to the property of the Port District. These applications also set forth a proposed form of lease agreement relating to use by the applicants of the Port District's internal tracks within the harbor area, but did not specifically request authority to operate over the Port District's tracks. (R. 385.) These applications were approved by the Commission in its order of October 5, 1959 (R. 320), with an important exception. The Commission rejected the proposed form of lease agreement with the Port District because of provisions that

would have prevented any other railroad from entering into any new arrangement with the Port District with regard to railroad facilities, including use of the Port District's own tracks, without the prior approval of each of the railroad appellants. (R. 279.)

In the second set of applications, the railroad appellants specifically sought authority to operate within the port and asked approval of a revised proposed lease of the Port District's internal tracks. By the Commission's order of September 19, 1960 (R. 383, 394), these applications were approved, without hearing (although a hearing was repeatedly requested by Rock Island) (R. 327, 349, 357) with the condition that material changes in that lease agreement would require further Commission approval. (R. 392.)

In the third set of applications, the railroad appellants sought approval of a contract, replacing the proposed lease, for the use of the Port District's tracks. (R. 450, 470, 490.) The contract differed materially from the lease approved by the Commission in its order of September 19, 1960. This, the ultimate contract, was approved by the Commission without hearing in its order of November 26, 1962 (R. 504), although again a hearing had been requested by Rock Island. (R. 478.)

A. The First Set of Applications.

The Commission's order of October 5, 1959, generally adopted the recommended report of the Examiner with an important exception: The Commission found that the railroad appellants' operations within the Port District required the filing of further applications. (R. 271.) The effect of the report of October 5, 1959, was to authorize the railroad appellants to operate over each other's lines as required to reach a proposed lead track, and then to construct and exercise trackage rights over the lead track

up to the Port District property. The report specifically stated:

> "We are of the opinion that operation by the applicants into the Port District, as proposed, constitutes an extension of a line of railroad requiring our prior approval. . . ." (R. 308.)
>
> "Orderly procedure dictates that all applications required to effect the entire plan be heard simultaneously, particularly, as here, where the evidence to be presented in support of the construction and trackage rights is identical." (R. 268.)

The net result of the order of October 5, 1959, was that the railroad appellants were authorized to construct and operate *up to* the Port District on the basis of findings as to the proposed service to industries *within* the Port District, a service to industries that they could not lawfully perform without seeking and obtaining further authority.

The applicants had entered into separate trackage contracts with each other, under which each of the owning companies—the Illinois Central, the Pennsylvania and the South Shore—gave trackage rights to each other and to each of the other applicants, and set forth the terms and conditions upon which these rights were to be exercised. (R. 281-4.) These were attached to the applications. In these contracts, each of the tenants agreed it would not serve industries served solely by the owning companies' tracks. (R. 283.)

In addition, the Pennsylvania proposed to serve Calumet Harbor Terminals (R. 308), although it did not apply for authority to serve this company and no evidence was introduced dealing with the need for Pennsylvania's service—or, for that matter, any other railroad's service—to the company.

B. The Second Set of Applications.

With the second set of applications the railroad appellants presented to the Commission a different lease of the Port District's tracks, which was approved by the Commission in its report and order of September 19, 1960. (R. 383, 394.) The major change in this lease agreement was the insertion of a statement to the effect that the total rental payable in any calendar year was not to exceed two dollars per revenue car or locomotive handled to or from the Port District, thereby deleting the previous provision that empty cars would be counted. (R. 1138; 340.) In examining the new proposed lease, the Commission did not discover that empty cars had been eliminated from the car count, stating that "with the exception of the revision ordered the principal provisions of the lease are identical to the agreement originally considered by us." (R. 391.) It is clear that the Commission examined the two proposed leases [Ex. H-64 offered in evidence at the hearing on the original application (R. 1135, 793) and the newly presented lease (R. 337)], thought them identical, and then in error approved the payment provision as it had appeared in the exhibit at the hearing. The lease approved by the Commission in its order of September 19, 1960 was never executed.

C. The Third Set of Applications.

The third set of applications dealt with a new agreement for the nonexclusive use of the Port District's tracks, which differed materially from, and replaced the lease approved by the Commission in its order of September 19, 1960. This agreement was executed by the railroad appellants and the Port District and presented to the Commission for filing. (R. 431.)

After the railroad appellants filed their application

for approval of the agreement, the Commission, in its order of May 15, 1962 (R. 468), directed them to file copies of an operating agreement governing their method of operation over the tracks covered by their agreement with the Port District. Approval of the operating agreement by the Port District was required before the use (lease) agreement with the Port District could, by its terms, become effective. (R. 468-69.) In purported compliance with this Order, the railroad appellants filed a "Submission" (R. 470) in which they referred to a proposed operating agreement which was agreed to "in principle" between the railroad appellants and which had been introduced as an exhibit at the hearing (Ex. H-29; R. 1132, 677), as an unsigned document. (R. 280.) On August 23, 1962, the Commission entered an order (R. 488) which, among other things, required the railroad appellants to file within 30 days an executed copy of the operating agreement showing approval by the Port District or face a possible vacation of the order dated September 19, 1960, and denial of the pending application. The railroad appellants then complied with the order of the Commission and by its order of November 26, 1962, the Commission approved the nonexclusive use agreement entered into between the railroad appellants and the Port District. (R. 504.)

These appellees were denied hearings on the second and third sets of applications which sought approval of various leases and agreements.

III. THE LOWER COURT DECISION.

Nickel Plate on April 4, 1960, filed an action in the United States District Court for the Northern District of Ohio, in which Rock Island intervened as a plaintiff, to enjoin and set aside the orders of the Commission. (R. 1172; 1186.)

The three-judge District Court on April 1, 1965, vacated the orders of the Commission and remanded the proceedings to the Commission for rehearing on all issues. (R. 1404.) As to the order granting permission to operate up to the boundary of the Port District, the Court found no substantial support in fact or law for the major conclusions of the Commission. As to the issues involved in operations of the six railroads within the Port District, the Court held that Rock Island and Nickel Plate had been denied due process of law when the Commission refused them a hearing, and that such refusal was contrary to statute and resulted in a lack of substantial evidence to support the Commission's conclusions on the later applications. The Court held that the operations within and without the Port District could not be separated, and the denial of a hearing therefore was an additional reason for the Commission to hold further hearings on all issues.

SUMMARY OF ARGUMENT.

In reviewing the orders of the Commission approving additional rail service to Lake Calumet port, the three-judge District Court below correctly understood the limits of its reviewing function and applied the proper standard to the record before it. As a result, the Commission's findings that the additional rail service proposed was necessary to meet a present or future need for such service and would be reasonably profitable, were correctly rejected as unsupported by substantial evidence.

There was and is no dispute that the services of Rock Island and Nickel Plate were adequate to meet the present needs of Lake Calumet port. On the question of future need for rail service and the prospective development of Lake Calumet, the evidence adduced before the Commission was so totally devoid of factual possibility as to be no evidence at all. The Commission abused its discretion in approving additional rail service to an area being adequately served by existing carriers, on the basis of surmise, hopes, plans, and worthless estimates. On the issue of profitability of the proposed operation, it was impossible for the Commission to determine anticipated costs and revenues, and it side stepped the issue by erroneously concluding that charges were indefinite and could be adjusted to meet actual costs.

Stripped of the findings for which the District Court correctly found no support in fact, the remaining findings of the Commission could not support its ultimate decision. The benefits to Lake Calumet port that would allegedly result from the approval of additional rail service were insufficient as a matter of law to justify the Commission's

order. Principles embodied in the National Transportation Policy and the Interstate Commerce Act are designed to prevent improvident investment by carriers to the ultimate detriment of the public interest, and to protect carriers from the harms of unrestrained competition. These principles, applied to the circumstances prevailing at Lake Calumet port, necessitated reversal of the Commission's order. Having concluded that crucial findings of the Commission were unsupported in fact or law, the Court below correctly remanded the proceedings for further hearing.

Appellees contend that if, contrary to their argument, error was committed by the District Court, this case should be returned there for that Court's further consideration, so as not to burden this Court with a detailed consideration of a volume and variety of facts and issues having relevance only to the instant case. If, however, a review *de novo* of the validity of the Commission's orders is appropriate here, the course of events since 1957-59, of which we ask this Court to take judicial notice, proves beyond question that the decision of the Commission was without factual premise, was based upon speculation devoid of factual possibility, and that the evidence before it in the form of estimates, plans and hopes for the future was no evidence at all. Contrary to the circumstances prevailing in 1957, sufficient facts are now available on all of the issues for the Commission to make a valid determination of whether additional rail service is or is not needed, and should or should not be provided, to Lake Calumet. Accordingly, a remand to the Commission, as the Court below ruled, is essential.

Finally, the failure of the Commission to afford appellees a hearing with respect to the additional applications filed by the appellant railroads was contrary to the dictates of the Interstate Commerce Act and the Administrative

Procedure Act. The denial of such a hearing foreclosed consideration of the impact upon the existing carriers of the proposed operations within the Port District, denied appellees due process of law, and divested the orders of the Commission of evidentiary support.

ARGUMENT.

I. THE DISTRICT COURT CORRECTLY CONCLUDED THAT NEITHER FACT NOR LAW SUPPORTED THE ORDERS OF THE INTERSTATE COMMERCE COMMISSION APPROVING ADDITIONAL RAIL SERVICE TO LAKE CALUMET PORT.

The challenge by appellants to that portion of the decision below vacating the Commission's approval of additional rail service to Lake Calumet port involves essentially two claims: (1) That in its review the District Court applied an erroneous legal standard and thus improperly substituted its judgment for that of the Commission;[1] and (2) even if the Court correctly understood the limits of its reviewing function, its own opinion, and the facts of record, make it obvious that the proper standard was misapplied.[2] The second claim will be answered first.

A. The Opinion Below Clearly Indicates the Errors Made by the Commission, and Why Its Orders Were Vacated.

Relying upon the fact that the majority opinion below adopted major portions of the dissenting opinion and thus approved certain "important findings" of the Commission, appellants argue, with some inconsistency, that the District Court decision is "paradoxical",[3] without "rational

1. Brief for Appellants, No. 15 (hereinafter "Brief for Railroads"), pp. 21-22; Brief of Appellants, No. 17, Calumet Harbor Terminals, Inc., North Pier Terminal Co. (hereinafter "Brief for Industries"), pp. 21-24; Brief for the United States and the Interstate Commerce Commission, No. 20 (hereinafter "Brief for Commission"), pp. 22-28.

2. Brief for Railroads, pp. 16-17, 21; Brief for Industries, pp. 20-21, 23-24; Brief for Commission, 25, 28-29.

3. Brief for Railroads, p. 14.

basis"[4] and "that the Court pointed to no defect in the record to support its ruling."[5] In other portions of their briefs, however, appellants indicate a clear understanding of the opinion. For example, the appellant industries make the following contention: "As to the convenience and necessity issue, the Court found substantial evidence to support *many* of the Commission's important findings. We submit that *those findings,* in turn, were *adequate* support for the basic and ultimate conclusions of the Commission approving the applications. . . ."[6]

Analysis of the opinion below reveals that its result is not only consistent with the Court's relevant observations, but is in fact their logical and inevitable result. Contrary to the appellant industries' contention that the majority adopted the draft opinion tendered by the dissenting judge "without material changes, except for the conclusion,"[7] the majority opinion specifically rejected the "major conclusions" adopted by the Commission as being unsupported in fact or law.[8] These "major conclusions", or findings,[9] were the support relied upon by the Commission for its ultimate decision—approval of additional rail service to Lake Calumet.

The most important determination of the Commission, for which the majority below found no substantial support, was that the applicants had *proved* the proposed railroad

4. Brief for Industries, p. 20.

5. Brief for Commission, p. 22.

6. Brief for Industries, p. 18, emphasis supplied. See also Brief for Railroads, p. 20; Brief for Commission, p. 28.

7. Brief for Industries, p. 20.

8. This is recognized by the appellant railroads' claim that "on the very important matters which the Court stated there was not support in the record, the evidence overwhelmingly supports the Commission finding. . . ." Brief for Railroads, p. 16.

9. These "major conclusions" appear in the section of the Commission opinion entitled "Findings and Conclusions." R. 309.

construction (and the concomitant need for additional rail service) "presently or in the reasonably near future is necessary to meet a public need and will be reasonably profitable."[10] This determination of the Commission had two elements: (1) proof of present or future need for additional rail service;[11] and (2) proof that the proposed construction and service would be reasonably profitable.

Once the District Court had concluded there was no substantial evidence to support these two determinations, the approval of additional rail service could not stand. *Burlington Truck Lines* v. *United States,* 371 U. S. 156 (1962).

This Court has, in *Chesapeake & O. Ry.* v. *United States,* 283 U. S. 35 (1931), concisely stated the meaning of "public convenience and necessity" as those terms are used in the Interstate Commerce Act as a requirement for the extension of rail service:

> "Undoubtedly the purpose of these provisions [49 U. S. C. § 1 (18), 1 (20)] is to enable the Commission, in the interest of the public, to prevent *improvident* and *unnecessary* expenditures for the construction and operation of lines not needed to insure adequate service." 283 U. S. at 42; emphasis supplied.

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10. Opinion Below: R. 1414. The first paragraph of the appellant railroads' "Summary of Argument", p. 13, and their analysis, pp. 16-17, of the findings rejected by the Court below completely overlook the fact that these findings were also rejected by the Court.

11. Some evidence of present need is required, even when the principal justification for the extension is expected future traffic, because, under long-standing Commission policy, approved extensions are required to be completed within a short period of time, as was the case herein. R. 312. When the extension is wholly unneeded at the time of application, and is sought solely in anticipation of a future need, the Commission has refused to issue a certificate of public convenience and necessity. See, e.g., *San Benito & R. G. V. Ry.,* 124 I. C. C. 637, 639 (1927).

In light of the requirement of "public convenience and necessity", and having determined that the elements of need and profitability had not been proved, the inquiry by the Court below was at an end, regardless of what else the record might have shown. The next question, therefore, is whether the District Court correctly held these findings unsupported by the record.

B. The District Court Correctly Concluded There Was No Substantial Evidence to Support the Commission's Determination That Additional Rail Service to Lake Calumet Port Was Needed and That Such Service Would Be Profitable.

1. *There was no dispute that the rail service at Lake Calumet port was presently adequate, and the Commission so held.*

With respect to the rail service being rendered to Lake Calumet port by Rock Island and Nickel Plate, the Commission made the following findings:

> "No complaints of sufficient magnitude to be emphasized in the record have been made of Rock Island service to the industries at the port. This is particularly so since the filing of the applications when superior service with ample engines and crews was instituted and has been continued. Not only does the Rock Island have a flexible switching operation in the vicinity of the port, but its entire terminal operation is geared to provide a constant flow of cars into and out of the area without interfering with the work being performed by the engines pulling and setting cars at dockside or at the various transit sheds, warehouses, and elevators. It is prepared to furnish such additional service as may be required in the area. (R. 274.)
>
> "Without doubt, the Nickel Plate is ideally situated to provide service to the northern and eastern sides of the lake." (R. 275.)[12]

12. These findings, with minor changes, had been proposed by the Hearing Examiner. (R. 222, 223.)

In addition, dissenting Commissioner Freas concluded that "it seems clear that no present need for additional service has been established here," (R. 315), as did Judge Edwards in his dissenting opinion below:

> "[T]hat the railroad service offered by them [Rock Island and Nickel Plate] had been entirely satisfactory and still was . . . we [was] largely undisputed." (R. 1430.)

Moreover, Rock Island service to Lake Calumet port for both shippers and connecting lines, had, since its acquisition of Pullman, been impartial and nondiscriminatory, and the Commission so held:

> "The Pullman Railroad and the Rock Island were the pioneers in the Lake Calumet Harbor area, the former having been there since about 1880. In Finance Docket No. 16252, *Pullman R. Co. Control,* etc., 275 I.C.C. 803, decided November 17, 1949 (not printed in full), hereinafter called the *Pullman* case, the Commission, division 4, among other things, authorized the Rock Island to acquire control of Pullman Railroad through purchase of all its issued and outstanding capital stock, and to lease the railroad properties of Pullman for an initial period of 5 years, *subject to the usual conditions pertaining to the neutrality of service and the maintenance of operating practices then in existence between Pullman and its railroad connections. There is no evidence in this record indicating that the prescribed conditions ever have been violated.*" (R. 306; emphasis supplied.)

In light of the above, it cannot be denied that the District Court properly found no substantial evidence to support a present need for the additional rail service proposed.

2. ***The prospect of increased demand for rail service at Lake Calumet was based solely on conjecture, and the District Court correctly held there was no substantial evidence to support the finding that the proposed service was***

necessary to meet a public need in the reasonably near future.

As the Court below stated, "This litigation arises out of the national expectation that the completion of the St. Lawrence Seaway will bring a great increase in ocean-going freight to Great Lakes ports in the heartland of the continent."[13] We agree. But the connection between such completion and its prospective impact upon the need for additional rail service at Lake Calumet was so tortuous, in reasoning as well as in geography, as to render the prospect nothing more than a hope.

As the Commission correctly observed, "there are a number of factors to be considered in determining the amount of traffic which will be handled by Lake ports generally, by Lake Michigan ports, by the Chicago ports, *and finally* by Lake Calumet port."[14] Lake Calumet port is but one of seven harbor facilities included within the "Port of Chicago" designation of the Department of Army Corps of Engineers.[15] It is immediately apparent, therefore, that an increase in the amount of traffic on the Great Lakes occasioned by the opening of the Seaway would not necessarily have any appreciable impact on Lake Calumet port, and would in any event be divided among many facilities, not limited to the Port of Chicago generally nor, of course, Lake Calumet.

The numerous factors that the Commission found would govern the future increase in traffic were applicable to the Great Lakes as a whole. These were, as testified to by Rock Island's witness before the Commission, Dr. Marvin L.

13. R. 1404. See also Brief for Industries, p. 3; Brief for Commission, p. 2.

14. R. 294; emphasis supplied.

15. R. 1074.

Fair:[16] the length of the shipping season, and the physical conditions of navigation; potential for two-way cargo; toll charges and capacity of the Seaway facilities; competitive conditions and costs affecting both ports and shipping companies; opposition to rates that would equalize Great Lakes ports with seaports; the existing pattern of favoritism by shippers to ocean ports; and general political, military and economic conditions.[17]

In addition to these factors were those specifically applicable to Chicago. As Dr. Fair stated:

> "Added to the uncertainty of the seaway traffic as a whole is that relating to the volume that is likely to move to and from the Chicago area. In arriving at an approximation, consideration would have to be given to the division of traffic between and among the ports of Chicago, Milwaukee, Duluth, Detroit, Toledo, and other ports similarly situated. Among the factors which will affect the volume of traffic moving to and from the Chicago area are the added costs of transportation and the additional sailing time involved." (R. 1073.)

Finally, the remaining factor involved in the prospect of increased demand for rail service at Lake Calumet was the extent to which the facilities there were developed and the length of time involved in completing the project. Again as Dr. Fair stated:

> "What part of the total increase in trade in general cargo and grain Lake Calumet Port will enjoy in competition with other segments of the Port of Chicago

16. Dr. Fair was Director of the Tulane University Institute on Foreign Transportation and Port Operations, former Research Director of the Great Lakes and Inland Waters Survey of the Federal Communications Commission, former Chief Consultant to the Division of Transportation of the War Production Board, and for two years Chief of the Port Development Section of the United States Maritime Commission. (R. 1065-66.)

17. R. 294-95; 1073.

> is very difficult to determine. The traffic in and out of Lake Calumet Port will be influenced by improvements and developments at other segments of the Port of Chicago, by the number and size of wharves at Lake Calumet, and by the extent to which these leased facilities are used for storage rather than for transit cargo." (R. 1074.)

This conclusion was corroborated by a witness for the applicant railroads, A. E. Bayliss, Vice President, Freight Sales and Service, New York Central System:

> "In looking into the crystal ball of the future and trying to determine the amount of business that any one carrier serving Chicago might expect as a result of a port that is yet to be built and served by a seaway that is yet to be completed, it is at best an inaccurate and very unsatisfactory calculation."[18]

On the basis of the foregoing, it can be seen that the predicted need in the reasonably near future for additional rail service was based upon three levels of supposition, and was properly rejected by the Court below: assuming completion of the Seaway,—*if* the numerous factors governing traffic on the Great Lakes produced an increase in such traffic; and *if* such increase was reflected at Lake Calumet; and *if* the proposed plan for development at Lake Calumet reached fruition—*then* there would be a need for the additional rail service which the applicant railroads sought to provide. There would seem to be no question that such prediction was based upon speculation and conjecture and not substantial evidence.

The course of events since 1957, of which we hereafter ask the Court to take judicial notice, proves beyond question the validity of Dr. Fair's conclusion then that "it is impossible now to determine the amount of rail traffic which will be generated" at Lake Calumet. (R. 1075.)

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18. Package No. 4, Fol. 3632-33 (Orig. Rec.), not printed in the Transcript of Record.

While "forecasts as to the future are necessary", and "uncertainties" may be involved, *United States* v. *Detroit & Cleveland Navigation Co.*, 326 U. S. 236, 241 (1945), the evidence before the Commission and the findings actually adopted fell considerably short of the standard of "reasonable certainty" of need for additional service in the near future, necessary to support the determination of the Commission.[19]

The Commission itself has denied certificates of public convenience and necessity where future need was speculative. In *Coos Bay Southern Ry. Co.*, 193 I. C. C. 297 (1933), a certificate was denied because of such uncertainty:

> "The record presented in this case does not justify the granting of a certificate of public convenience and necessity. The estimates of tonnage and revenue appear to be based more upon hope than upon any reasonable expectation." 193 I. C. C. at 299.

Again, in *Burlington, M. & N. W. Ry.*, 202 I. C. C. 51 (1934), a certificate was denied because the evidence of future need was "speculative":

> "The principal incentive is the tonnage to be secured from limestone deposits, the development of which awaits the completion of the railroad. . . . The success of the railroad would therefore depend in large measure on the future development of this industry and up-

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19. 326 U. S. at 239. The factual circumstances in *United States* v. *Detroit & Cleveland Navigation Co.*, *supra*, make clear that evidence of future need must be more compelling in a situation such as the one at bar. As was noted: "The case, however, is not one where there is a service presently being rendered and a newcomer seeks entry into the field. Whether in that event the ruling of the District Court would be correct is a question we do not reach." 236 U. S. at 239. The case presently before the Court is, of course, one where "newcomers seek entry into the field." See pages 6 to 9, *supra*.

on the evidence submitted must be regarded as highly speculative." 202 I. C. C. at 59.[20]

The quality of evidence required to justify "public convenience and necessity" based on future or prospective needs is well defined in the opinion in *American Airlines, Inc.* v. *CAB*, 192 F. 2d 417 (D. C. Cir. 1951):

> "Since regulatory functions must necessarily contemplate the future, the law which is involved in those functions must be realistic enough to permit that scope. So, when a prospective rule is required to be upon evidence, that evidence must be construed to include estimates, or forecasts, or opinions, on future events. At the same time, governmental permissions for the future cannot be fashioned from pure fantasy, speculation devoid of factual premise. Public convenience and necessity in the sense of these statutes has a hard core of factual possibility, which can be ascertained and evaluated only upon the basis of present and past events and conditions." 192 F. 2d at 421.[21]

The present case reflects the fulfillment of none of these requirements. Because the Commission proceeding was premature, occurring before the opening of the St. Lawrence Seaway at a time when virtually all of the Lake Calumet port project was still on the drawing boards, and before reasonably dependable evidence as to traffic volume through the Seaway and into Lake Calumet could be compiled, the applicants could offer, and did offer, the Commission nothing more than "speculation devoid of factual premise."

In the Commission's statement herein that "the future needs of the port make it *advisable and expedient* that

20. See also *San Antonio & Mexican Ry.*, 90 I. C. C. 597 (1924); *Northern Oklahoma Rys.*, 111 I. C. C. 765 (1926); *Cane Belt R. R. Co.*, 150 I. C. C. 97 (1928); *Sabine Basin Ry.*, 170 I. C. C. 653 (1931).

21. The opinion makes clear that the Court's discussion of this problem was applicable to all regulatory agencies and not merely the Civil Aeronautics Board. 192 F. 2d at 420.

more than one railroad be permitted to serve the port in the future," (R. 312, emphasis supplied) the "future" was by no means near. In its opinion of 1959, the Commission stated that completion of the east side of Lake Calumet was "expected" by 1968 (R. 294), and that it was the "hope" of the Port District to complete development of the entire west side of the lake for commercial purposes "within 10 years." (R. 278.)

Furthermore, approval of additional rail service because it is "advisable and expedient" falls far short of the statutory requirement of "convenience and necessity" and reflects an improper construction of that requirement by the Commission in these proceedings, indicating consideration of only the "convenience" involved. The Commission's error was further compounded, in light of the lack of justification for additional rail service beyond that provided by the two existing railroads, by making no determination that the services of these *six* additional railroads were needed rather than those of a lesser number.

Evidence offered to prove public convenience and necessity should be of such quality as to permit the Commission to give adequate protection to the public interest. This proceeding exemplifies, as though drawn from a textbook, the inherent inadequacy as "evidence" of speculation and conjecture as to conditions that may or may not exist at some distant date. The Commission in this proceeding rendered its decision, not upon probative evidence of future probabilities, but upon the hopes and ambitions expressed by the applicants and their witnesses and unexecuted plans for the future. The inadequacy of such "proof" is apparent to reason and, prior to this proceeding, has been accorded little weight. See *ICC* v. *Piedmont & N. Ry.*, 51 F. 2d 766, 771 (W. D. So. Car. 1931):

> "Railroad undertakings are generally more ambitious in their origin than they become in completion

> for decades. In this very territory is a road named Charleston, Cincinnati & Chicago, with a charter setting out fully such an ambitious undertaking. A half century has elapsed and this railroad has reached neither Charleston on the one end, nor Cincinnati and Chicago on the other. Any broad and liberal interpretation of the ambitions, past intentions, purposes, plans, and schemes of boards of directors of new railroads as constituting actual undertakings . . . would nullify the very purpose sought to be accomplished by the Transportation Act."

Should a Court view such "evidence" as legally adequate, it would encourage the premature filing of applications by carriers in every regulated industry, knowing that their optimistic predictions would be evidence as legally "substantial" as the conservative projections of their opponents, and would foster a "race to the Commission" before sufficient data were available to provide a "hard core of factual possibility."[22] This would surely subject the public unjustifiably to the very risks which the Interstate Commerce Act was designed to prevent.

We respectfully submit that the District Court's rejection of the Commission's finding of a need for additional rail service at Lake Calumet port in the reasonably near future was, in light of the evidence, absolutely correct, and that having so held, it properly vacated the Commission's orders.

3. *The District Court correctly rejected the Commission's determination that the proposed extension of rail service to Lake Calumet port would be profitable.*

The second crucial finding of the Commission rejected by the District Court as unsupported by substantial evidence was that the applicant railroads had proved their proposed operations would be "reasonably profitable."

22. *American Airlines, Inc.* v. *CAB, supra,* 192 F. 2d at 421.

The evidence before the Commission relating to the economics of the proposed rail operations was not only meager, but in important measure not accepted in the findings.

The only hard economic fact accepted by the Commission was the estimated cost of construction of the proposed rail line into the Lake Calumet port. (R. 265.) As for the cost of operations after construction, this would, of course, depend on the amount of traffic served and the expense involved in serving it. These costs would then have to be matched against revenues, which again would depend on the amount of traffic obtained by the applicant railroads.

At the outset, it is apparent that neither revenues nor incremental operational expenses could be determined, for there was no reliable way to estimate rail traffic to and from Lake Calumet port and how much of that traffic would be served by the applicant railroads.

There was an equally fundamental error made by the Commission in assessing the economics of the proposed operation: it improperly discarded the undisputed evidence of the intervenors (appellees here) that the switching revenues to the applicants under the proposed plan of operation would not exceed the trackage charges and expenses up to and at Lake Calumet, and would thus be improvident. (R. 1022-1065.) The Examiner had totally ignored the evidence (R. 231-232), and the Commission attempted to deal with it as follows:

> "Counsel for the Rock Island contends that the expense represented by charges for trackage rights and other charges involved in the operation by the applicants into the port will exceed the revenues to be derived from such service under applicable tariff provisions, and that we should not authorize an operation which can only result in deficits insofar as the appli-

cants are concerned. *The record shows that if direct service by the applicants to the port is permitted, the line-haul business, without doubt, will provide profitable operations for the applicants. As for the crosstown switching service, the charges to be assessed are indefinite, and no doubt will be adjusted to cover actual costs for the services provided.*" (R. 284; emphasis supplied.)

We respectfully submit that this resolution of the issue of improvidence raised by the intervenors was both factually erroneous and legally improper.

First, neither the applicant Indiana Harbor Belt nor the applicant Chicago Belt had any "line-haul business" (R. 272), and would thus have no revenue from this type of operation with which to offset their losses under the proposed services.

Second, the Commission was wholly unjustified in assuming that the "charges to be assessed are indefinite and will no doubt be adjusted to cover actual costs." It would have been one thing for the Commission to have concluded that the intervenors' analysis of revenues and costs was in error but the Commission did not so find.[23] It merely side stepped the issue by saying, in effect, that the applicant railroads could always raise the price of their services.

This determination conflicted with the Commission's

23. It should be noted that after the testimony of the intervenor's witness R. C. Davidson to the effect that the proposed operation would be improvident (R. 1022-1063), the applicant railroads on the last day of the hearing recalled to the stand J. M. Trissal, chief engineer of the Illinois Central who had been engaged in the negotiations with the other applicants to draw up a lease agreement with the Lake Calumet port. (R. 793.) Upon being recalled, he stated that "while he was not at the meeting when the decision was made," a final decision on modification of the agreement had been made "yesterday." (R. 1126.) The modification was a provision that empty cars would not be counted in trackage charges and charges would not be eliminated after 7000 car counts per year. (R. 1125.)

responsibility to determine that extension of rail service be "justified in terms of the *reasonably predictable revenues,*" *Purcell* v. *United States*, 315 U. S. 381, 385 (1942) (emphasis supplied), and ignored the obligation of the applicants to "prove that the proposal either presently or in the reasonable future will be self-sustaining," *ICC* v. *Oregon-Washington R. R. & Nav. Co.*, 288 U. S. 14, 37 (1933). It was also factually in error:

(a) The charges for cross-town switching (revenue to the railroads) referred to were not "indefinite" but were fixed by tariff, were uniform and applied equally to every industry in the Chicago Switching District. (R. 303-04.)

(b) The proposed agreement of the applicants with the Port District, which the Commission approved, provided that freight charges *to the port* must be the same as those applying elsewhere. (R. 339.) Thus, unless switching charges in the Chicago Switching District in general were raised, the cross-town switching charges to and from the port could not be increased; if they were, it would not only be a breach of the agreement between the applicants and the port but might well constitute an unlawful discrimination against the Lake Calumet industries. Finally, an increase in Chicago Switching District charges would hardly seem justified by a desire to cure an improvident operation at Lake Calumet.

For these reasons, the District Court was correct in concluding that there was no substantial evidence to support the Commission's determination that the proposed operation would be "reasonably profitable."

In addition to a finding of need, this finding was equally essential to a valid determination by the Commission that the additional rail service was required as a "public convenience and necessity." With reference to the basic purpose of § 1(18) of the Interstate Commerce Act, this Court

has repeatedly stressed its importance as a curb upon imprudent expenditures in the extension of rail service.

In *Texas & Pac. Ry.* v. *Gulf, Colo. & S. F. Ry.*, 270 U. S. 266 (1926), this Court noted that Congress, by enacting the Transportation Act of 1920, recognized "that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public," 270 U. S. at 277, and stated its view with respect to § 1(18):

> "By that measure, Congress undertook to develop and maintain, for the people of the United States, an adequate railway system. It recognized that preservation of the earning capacity, and conservation of the financial resources, of individual carriers is a matter of national concern; that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public. . . ." 270 U. S. at 277.[24]

It is submitted that under both the facts and law, the District Court correctly rejected the Commission's determination on the issue of improvidence, and for that reason, in addition to its rejection of the Commission's determination of future need, a remand to the Commission was required.

C. Other Findings of the Commission, Including Those Approved by the Court Below, Did Not Justify the Commission's Approval of Additional Rail Service.

1. *The District Court properly rejected, as justification for additional rail service, the alleged benefits that might be involved.*

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24. See also *Texas & N. O. R. R.* v. *Northside Belt Ry.*, 276 U. S. 475 (1928); *Powell* v. *United States*, 300 U. S. 276 (1937); *ICC* v. *Oregon-Washington R. R. & Nav. Co.*, 288 U. S. 14 (1933); *Chesapeake & O. Ry. Co.* v. *United States*, 283 U. S. 35 (1931); *Purcell* v. *United States*, 315 U. S. 381 (1942).

The District Court below approved certain findings of the Commission pertaining to larger yard capacity, more direct service to the port and lower costs to shippers because of the elimination of some switching charges for certain traffic.[25] Nevertheless, it rejected as a matter of law, the finding that "better service to shippers and receivers of freight through the elimination of delays, by providing single-line hauls or more direct hauls was clearly in the public interest" in the circumstances attending this case.[26] The opinion below rejected the crucial findings of the Commission as having insufficient support in both fact *and law*.[27] While it was contended that better service to shippers and receivers of freight might result from approval of the proposed operations, that determination alone was not sufficient in law to justify the approval of the applications.

All shippers everywhere would welcome the opportunity for a choice of railroad services, for it is unquestionably true in the unregulated sector of our economy, that competition is the spur to better goods and services at lower prices. This principle is, however, qualified in the context of regulated industries, such as railroads, where Congress has sought to limit the destructive elements of unrestrained competition by providing a balance that will serve the entire public interest and not merely one segment thereof.

A more emphatic recognition of this principle by the Commission cannot be found than in its decision in *Galesburg & Great Eastern R. R.*, 244 I. C. C. 470 (1941):

> "Industries generally desire the convenience of as many direct trunk-line connections as possible. Justification for the construction of a line of railroad in interstate commerce, however, must be established by a clear proof that the railroad is to be both a public

25. R. 1411.
26. R. 1414.
27. R. 1415.

convenience and a public necessity. We have said that the latter implies a strong or urgent need." 244 I. C. C. at 477.[28]

As pointed out by Interstate Commerce Commissioner Clark while speaking before the House Committee on Interstate and Foreign Commerce during its consideration of the enactment of the present § 1(18-22) of the Act, the purpose of the section was:

> "to prevent the building of duplicate lines of railroad because of keen rivalry of certain financial interests, or when the railroads so built will not serve the present or future convenience and necessity, and will simply depend for traffic upon that which they can get away from railroads already built, adding to the total burden of maintenance, capital returns, etc., which the public must pay."

The above was quoted in *Detroit & M. Ry. Co.* v. *Boyne City, G. & A. R. R.*, 286 Fed. 540, at 545 (E. D. Mich. 1923), where the Court also stated the following:

> "Congress had in mind and was endeavoring to correct the disastrous evils, to both the railroads and the public, which for many years had attended the construction of lines of railroad, main and branch, in ruinous competition with each other and with resultant injury to the public, which was compelled to bear the inevitable consequences of such a situation." 286 Fed. at 545-46.

The National Transportation Policy, defined by Congress in 1940 (49 U. S. C., Ch. 1, p. 9163), is not served by the issuance of certificates of public convenience and neces-

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28. See also *Public Convenience Application of Atlanta & St. A. B. Ry.*, 71 I. C. C. 784, 792 (1922) ("That such operation would be a matter of convenience to the two remaining shippers of fish may be conceded, but it can hardly be said to be a matter of necessity."); *Utah Terminal Ry.*, 72 I. C. C. 89, 93 (1922) ("A public need can hardly be predicated upon the demand of three shippers who may desire to introduce the element of competition in order to improve their position in their own competitive field.")

sity that will have the effect of creating destructive competition while filling no clearly evident public need. This Court has repeatedly held that creating or maintaining competition is not justified if such competition does not serve the public interest as defined in the National Transportation Policy. In *McLean Trucking Co.* v. *United States,* 321 U. S. 67 (1944), the Court noted that the preservation of free competition, so important in antitrust legislation, plays a far less important role in transportation statutes:

> "The history of the development of the special national transportation policy suggests, quite apart from the explicit provision of § 5(11), that the policies of the anti-trust laws determine 'the public interest' in railroad regulation only in a qualified way. And the altered emphasis in railroad legislation on achieving an adequate, efficient, and economical system of transportation through close supervision of business operations and practices rather than through heavy reliance on the enforcement of free competition in various phases of the business [citing cases] has its counterpart in motor carrier policy." 321 U. S. at 83.

To the same effect is this Court's recent decision in *Sea Board Air Line R. R.* v. *United States,* 382 U. S. 154 (1965).[29]

The Commission also found herein that the services of Rock Island, unlike those of applicants, New York Central and Pennsylvania, were complementary to and not competitive with the water route that was to be responsible for development of additional future traffic at Lake Calu-

29. While, as appellant railroads contend in their Brief, pp. 21-22, the Court below may have made a "mechanical error" in citing *Chesapeake & O. Ry.* v. *United States,* 283 U. S. 35 (1931) and *Schaffer Transp. Co.* v. *United States,* 355 U. S. 83 (1957), these cases make clear that competition is only one factor to be considered by the Commission, and thus the citation in no way conflicts with the result below. Compare *McLean Trucking Co.* v. *United States,* 321 U. S. 67 (1944).

met. (R. 275.) This significant finding underscores the incompatible roles of the applicants, and creates serious doubt whether they will adequately promote and service Lake Calumet port.[30] A strikingly similar situation arose in *Sabine Basin Ry.*, 170 I. C. C. 653 (1931), where the Commission denied a certificate of public convenience and necessity on the ground that, while the applicants would increase competition at ports in the Sabine-Neches district of Texas, they did not have as much interest in the development of these ports as did the railroad (Kansas City Southern) presently serving the area:

> "Both the Missouri Pacific and the Atchison have other Gulf ports in which they are more interested than they are in the Sabine ports. . . .
>
> "If the applications were granted the K. C. Southern would still be the line primarily interested in developing the port of Port Arthur and the Sabine-Neches district. Although the Southern Pacific handles much traffic to and from the district it has other Gulf ports where it has extensive facilities so that its interest in the Sabine Basin is not so vital as that of the K. C. Southern. The latter has been working for the development of the Sabine ports for more than 30 years . . . and its location was planned to suit the probable development of the territory and to serve advantageously new industries as they may be located in the district." 170 I. C. C. at 668-69.

Moreover, the professed interest of the appellant railroads in the benefits to be derived from additional rail service should be viewed in light of their own conduct in the past with respect to the area. In fact, while they have argued the benefits of rail competition, their real efforts have been directed toward its elimination, or at least its restriction, at Lake Calumet.

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30. Appellees attempted to bring evidence of this before the Commission after its initial order. See Petition for Reconsideration, November 3, 1960. (R. 395, 417.)

The lease agreement originally proposed by the railroad applicants would have prohibited the Port District from permitting any other carrier to construct, lease or operate railroad facilities on its property for the purpose of serving Lake Calumet. The Commission condemned this restriction. (R. 279.)

The Pennsylvania individually attempted to prohibit competition for the traffic at Calumet Harbor Terminals, Inc., a facility located adjacent to the property of the Port District and purchased by the Pennsylvania in 1957 and leased back to the industry. It admitted at the hearing its decision to prohibit Rock Island from serving those facilities, and its indecision as to whether the other railroad applicants would be permitted to do so. The Commission properly said of this conduct: "The position assumed by the Pennsylvania in this regard cannot be countenanced." (R. 309.)

Finally, the agreements entered into by the six applicant railroads with each other covering the use of tracks required to reach the Port District, provided that each should "have no right to deliver or receive any freight traffic to or from any industry which is presently or hereafter served solely by" one of the other contracting railroads. (R. 32, 37-8, 43, 49, 54, 59, 83, 87, 91, 94, 154, 160, 165, 170, 176, 182.) This meant that every industry served by only one of the applicants would be insulated from competitive rail service such as the applicants professed was so desirable for the industries served by Rock Island and Nickel Plate at Lake Calumet.

2. *The remaining findings approved by the District Court were not sufficient to support the Commission's approval of the applications.*

Of the Commission's findings for which the lower court did find substantial support in the record—the expected

completion of the St. Lawrence Seaway, the ships expected to use it, the importance of the Port of Chicago and its characteristics, the population and features of the Chicago area generally, and the location and facilities of Lake Calumet port (R. 1409-11)—only two, and in the most oblique fashion, deal with any future need for rail service at Lake Calumet: the necessity for "substantially broadened railroad service" at Lake Calumet for the volume of shipping expected to come into *Chicago* (R. 1410); and the requirement that "a plan and system for handling the transportation needs of the port be established." (R. 1411.)

These findings refer only generally to the need for transportation services, and the latter finding makes no mention of rail traffic at all. There was no indication that the services, plans and systems did not already exist, and in fact the Commission held that the services of Rock Island and Nickel Plate were adequate and would continue to be so. (R. 274-75.)

Such vague and general observations cannot be viewed in logic or in law as constituting a determination, or even a supportable prediction, by the Commission that future *rail* traffic at Lake Calumet port "will require the construction, or operation," of the additional rail lines and service proposed by the six railroad appellants. Any conclusion of future need for rail service based on such general findings on many subjects would clearly not constitute a proper discharge of the Commission's responsibility.

3. *In light of the District Court's rejection of "major conclusions" of the Commission, these proceedings were correctly remanded for further consideration.*

The cardinal principle that "the agency must make findings that support its decision, and those findings must be supported by substantial evidence," *Burlington Truck*

Lines v. *United States*, 371 U. S. 156, 168 (1962), has as its necessary corollary the rule that a decision not supported by adequate findings buttressed by substantial evidence, must be remanded to the Commission for its redetermination. The importance of the rule that a reviewing court should remand a case to the administrative body where an important finding is either missing or unsubstantiated by the facts is emphasized in *Burlington*, 371 U. S. at 168-69:

> "Commission counsel now attempt to justify the Commission's 'choice' of remedy on the ground that a cease-and-desist order would have been ineffective. The short answer to this attempted justification is that the Commission did not so find. *Securities & Exchange Comm'n* v. *Chenery Corp.*, 332 U. S. 194, 196. The courts may not accept appellate counsel's post hoc rationalizations for agency action; *Chenery* requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself:
>
> > '[A] simple but fundamental rule of administrative law . . . is . . . that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action. . . .' Ibid."

Cf. Communist Party v. *Subversive Activities Control Board*, 367 U. S. 1, 67 (1961).

The District Court held that no substantial evidence supported the Commission's finding that, "the time has come when additional rail service at the Port is required for the future development of the industries now or hereafter to be located there." It likewise found unsubstantiated the Commission's finding that the applicants had proved that "the

proposed constructions either presently or in the reasonably near future is necessary to meet a public need, and will be reasonably profitable. . . ." (R. 1414-15.) These findings were the keystone of the Commission's ultimate decision that, "the present and future public convenience and necessity require the service of the applicants." (R. 312.)

The authorities make clear that it would be a judicial usurpation of an administrative function for a court to determine whether the remaining record-substantiated findings indicate "that present or future public convenience and necessity require or will require the construction of . . . such additional . . . line of railroad." 49 U. S. C. § 1(18). See also Administrative Procedure Act § 10(e), 5 U. S. C. § 1009(e).

If the benefit of the expertise, which the Commission here so vigorously asserts must be exercised by itself,[31] is to be realized, this Court should affirm the order of the District Court remanding the case to the Interstate Commerce Commission for its further consideration in light of the fact that several of its most important conclusions have been correctly held to have been unsubstantiated by the evidence.

D. The District Court Applied the Correct Standard of Review.

Analysis of the opinion and proceedings below unquestionably demonstrates that the District Court carried out its proper function and understood the correct standard for its review: whether the agency has made "findings that support its decision, and that its findings are supported by substantial evidence." *Burlington Truck Lines* v. *United States*, 371 U. S. 156, 168 (1962).

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31. Brief for Commission, pp. 22-23.

Appellants argue[32] that the wording of the Court's conclusion makes it apparent that the Court applied the wrong standard when it stated that the "record does not offer ample support in fact and law for the conclusions of the Interstate Commerce Commission quoted. . . ." They assert that the term "ample support" means something other than "no substantial evidence" and is a higher standard of proof, although they point to no authority for this contention.

It is clear from the balance of the Court's opinion that it considered these terms to be equivalent. Thus the Court said as to its function and the governing rule for its review of the Commission's decision:

> "We are confronted with two basic problems: (1) whether there is *substantial evidence* to support the decision of the Interstate Commerce Commission; and (2) the denial to the plaintiffs of due process of law." (R. 1407; emphasis supplied.)

An equally convincing indication that the Court understood the correct rule resides in its observation that "it is clear that a certificate of convenience and necessity cannot stand unless it is based on findings of fact supported by substantial evidence. 5 U. S. C. § 1009 (e)" (R. 1417.) The statutory reference is, of course, to the Administrative Procedure Act which provides that a reviewing court "shall . . . (B) held unlawful and set aside agency action, findings and conclusions found to be . . . (5) unsupported by substantial evidence. . . ."

Furthermore, in the very next paragraph after its use of the phrase "ample support", the Court pointed out that the Interstate Commerce Act, Section 1(18), gives the Commission the right to approve extensions of rail service limited only by the requirement that there be a "sub-

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32. Brief for Commission, pp. 23-24.

stantial showing" that present or future public convenience and necessity require such extention. (R. 1415.) Finally, the equivalence of the phrases "ample support" and "substantial support" is also indicated by the Court's determination that certain general findings by the Commission on the port, Chicago, the St. Lawrence Seaway, ships and the like had "substantial support in the record." (R. 1409.)

The pleadings, briefs, and oral arguments by the parties also brought forceably to the attention of the lower court the correct limits of judicial review. This standard, in one form or another, was incorporated in the Complaint of Nickel Plate (R. 1178) and its third supplement to its Complaint (R. 1325), in the Complaint of Rock Island (R. 1201), and in the answer of the six railroad appellants. (R. 1240.) In oral argument below, this test was discussed again and urged upon the Court by Rock Island (R. 1335), Nickel Plate (R. 1324-25) and, particularly, the Commission. (R. 1345-7.)

In light of the above, we submit there can be no doubt that the Court below understood the limits of its reviewing function and applied the proper standard.

E. If, as Claimed, the District Court Opinion Is Insufficient to Determine the Basis for Its Conclusion, or if It Appears That the District Court Misconstrued or Grossly Misapplied the Substantial Evidence Standard, Contentions With Which We Disagree, This Case Should Be Remanded to the District Court for Further Consideration.

It is suggested at page 28 of the Commission's brief, relying on *Consolo* v. *Federal Maritime Comm'n.*, 383 U. S. 607 (1966), that in the present case, should this Court determine that error was committed below, it would be proper to decide the case here rather than remand it to the

District Court. But this Court pointed out in *Consolo*, and the Commission agrees,[33] that the normal procedure, if the decision of the District Court were deficient, would be to remand the case to the lower court for further consideration under the proper standards. Not to do so would usurp the function of the District Court and make this Court the "reviewing body of the ultimate determination of the Commission."[34]

The principle announced in *NLRB* v. *Walton Mfg. Co.*, 369 U. S. 404, 408 (1962), that "the reviewing function has been deposited, not here, but in the Court of Appeals, as the *Universal Camera* case makes clear," applies with equal force to orders of the Commission, review of which Congress has deposited with specially constituted district courts.[35] If this Court were to believe that the District Court did not adequately perform its function, the case should be remanded to the District Court for a decision expressing and applying the proper standard. *United States* v. *Great Northern Ry.*, 343 U. S. 562, 578 (1952). This would implement the clearly expressed Congressional mandate.

This was precisely the approach taken by the Court in *Textile Workers* v. *Darlington Co.*, 380 U. S. 263 (1965). There the Court of Appeals for the Fourth Circuit, assumed the accuracy of the Board's findings of fact, but denied enforcement of a NLRB order because it was based on an incorrect interpretation of the law. The Supreme Court

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33. Brief for Commission, p. 28.

34. In *FCC* v. *Allentown Broadcasting Co.*, 349 U. S. 358, 365 (1955), it was said: "(I)t is not our function to reinstate the determination of the Commission. That would make this Court the reviewing body of the ultimate determination of the Commission."

35. In certain situations not relevant here, review of Interstate Commerce Commission orders resides in the Circuit Courts of Appeal. See e.g., 15 U. S. C. § 21.

affirmed that part of the decision, but deciding that review of the Board's findings was nonetheless necessary, remanded the case for a determination of whether the substantial evidence test had been met.

> "Review of that finding, which the lower court found unnecessary on its view of the cause, now becomes necessary in light of our holding in this part of our opinion, and is a task that devolved upon the Court of Appeals in the first instance. *Universal Camera Corp.* v. *NLRB,* 340 U. S. 474." 380 U. S. at 277.

This Court is always careful that its time not be taken up by involvement with factual issues having relevance only to the case before it, as the decision in *NLRB* v. *Pittsburgh S. S. Co.,* 340 U. S. 498 (1951), makes clear:

> "Were we called upon to pass on the Board's conclusions in the first instance or to make an independent review of the review by the Court of Appeals, we might well support the Board's conclusion and reject that of the court below. But Congress has charged the Courts of Appeals and not this Court with the normal and primary responsibility for granting or denying enforcement of Labor Board orders.
>
> "This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way. It is not for us to invite review by this Court of decisions turning solely on evaluation of testimony where on a conscientious consideration of the entire record a Court of Appeals under the new dispensation [the substantial evidence test embodied in Section 10(e) of the Administrative Procedure Act] finds the Board's order unsubstantiated. In such situations we should 'adhere to the usual rule of noninterference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations.'" 340 U. S. at 502-03.

The Commission's sole basis for proposing that this Court assume the reviewing function of the District Court is a reliance upon certain carefully selected passages from the *Consolo* case, a suit for private reparations by an injured shipper under the Shipping Act. In that case, this Court noted that the private dispute had been pending for many years,[36] that the reviewing function of the lower court had already been performed by it on two separate occasions, and that the issues before the Court had been narrowed by the earlier proceedings and reviews of the case. It is unreasonable to equate a suit for private reparations by an injured shipper with a proceeding, such as the present action, involving detailed consideration of a volume and variety of facts, in the context of present and future public convenience and necessity and the overall efficient administration of the National Transportation Policy.

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36. The mere fact that a case has been pending for an extended period of time has not been given determinative weight by this Court on the issue of the desirability of remand. Indeed, remands are common in protracted litigation. See, e.g., *Textile Workers* v. *Darlington Co.*, 380 U. S. 263 (1965) (case pending 9 years); *United States* v. *E. I. duPont de Nemours*, 366 U. S. 316 (1961) (case pending 12 years). Moreover, the delays in the present case are largely attributable to the applicants, whose inability to negotiate a satisfactory lease agreement postponed the Commission's final decision for over three years while the present litigation was being held in abeyance in the District Court. It would be patently inappropriate, therefore, to circumvent normal remand procedures at the behest of those who have contributed to the very delay upon which they now base their extraordinary request.

II. THE COURSE OF EVENTS SINCE 1957-1959 MAKES ABUNDANTLY CLEAR THE TOTAL LACK OF EVIDENTIARY BASIS FOR THE COMMISSION'S ORDERS.

We have argued in the first portion of our brief that the District Court below not only applied the proper legal standard for reviewing the orders of the Commission but also applied that standard to the case before it correctly. We have further argued that analysis of the decision makes clear the reasons why the District Court vacated the Commission's orders and that in so doing the Court complied fully with the dictates of the provisions of the National Transportation Policy, the Interstate Commerce Act and the Administrative Procedure Act. Finally, we have contended that if the District Court opinion was insufficient to determine the basis for its conclusion or if this Court believed that Court had misconstrued or grossly misapplied the proper legal standard for review, the case should be remanded to the District Court for further consideration.

Appellants, and particularly the Commission,[37] contend that this Court should make what amounts to a *de novo* consideration of the validity of the orders of the Commission under the facts before it and the applicable law. We answer that the question before this Court is not whether it would have reached the same decision as the District Court below, but whether that decision indicates misapprehension or gross misapplication of the substantial evidence test embodied in Section 10(e) of the Administrative Procedure Act.

The guiding principles for this Court's review of lower court decisions on administrative orders were announced

37. See Brief for Commission, pp. 28-29. The other appellants seek reversal with directions to the District Court to sustain or affirm the Commission's order. Brief for Railroads, p. 26; Brief for Industries, p. 28.

in two leading cases, *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474 (1951), and *NLRB* v. *Pittsburgh S. S. Co.*, 340 U. S. 498 (1951). These decisions, in addition to stating the criteria for judicial review under the Administrative Procedure Act and the National Labor Relations Act, also set forth the limits of review here of such lower court determinations.

In *Universal Camera* the unanimous Court said:

> "Our power to review the correctness of applications of the present standard ought seldom to be called into action. Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied." 340 U. S. at 490-91.

This Court has repeatedly held itself to be controlled by these principles. See *NLRB* v. *Walton Mfg. Co.*, 369 U. S. 404, 408-09 (1962); *NLRB* v. *News Syndicate Co.*, 365 U. S. 695, 703 (1961); *FTC* v. *Standard Oil Co.*, 355 U. S. 396 (1958); *NLRB* v. *American Nat. Ins. Co.*, 343 U. S. 395 (1952).[38]

If, however, this Court chooses to depart from the practice adopted in the cases cited above, in favor of the exceptional procedure in *Consolo* v. *Federal Maritime Comm'n.*, 383 U. S. 607 (1966), we ask consideration of the following.

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38. That the scope of this Court's review as articulated in the above cases applies with equal force to appeals such as that herein was made clear by *Universal Camera:*

> "It would be mischievous word-playing to find that the scope of review under the Taft-Hartley Act is any different from that under the Administrative Procedure Act. . . . And so we hold that the standard of proof specifically required of the Labor Board by the Taft-Hartley Act is the same as that to be exacted by courts reviewing every administrative action subject to the Administrative Procedure Act." 340 U. S. at 487.

It cannot be disputed that the extension of rail lines (or any mode of transportation) *now* in anticipation of *future* need and use involves a far greater risk of imprudent spending and destructive competition than such an extension to meet current, existing needs. Such an extraordinary risk requires extraordinary caution. The Commission must demand, and receive, sound factual evidence showing with reasonable certainty that there will be a public need for the extension of rail lines in the reasonably near and foreseeable future.

In the present case, we contend that the Commission did not exercise the degree of caution required, nor did it demand the proof necessary to make a sound judgment as to the future rail needs at Lake Calumet port. We were convinced of this deficiency at the time of hearing; our conviction has since been amply vindicated.

The Commission's decision in 1959 reflected the general optimism that the St. Lawrence Seaway would contribute tremendously to the shipping traffic at Chicago; it did not reflect the fact that such optimism was highly speculative. The Commission's decision echoed the high hopes of the Lake Calumet planners that the area would rapidly be developed to handle many times its existing volume; but its decision was purely conjectural. The effect of the Seaway upon shipping traffic at the Port of Chicago, and the role of Lake Calumet in handling any such additional traffic, was not proved either as a reasonable certainty or even as a likelihood. Nor was the evidence adequate to show that additional rail lines were required within the reasonably near and foreseeable future, even if water traffic increased at Lake Calumet.

In short, the applicant railroads and the Commission acted prematurely. The evidence was necessarily speculative, addressed to a not yet extant increase in shipping

traffic over an uncompleted waterway into yet unbuilt facilities at a but-newly-formed harbor. Such speculative evidence, it is submitted, is of no value in the Commission's task of ascertaining and minimizing the risks attendant to the present construction of lines in anticipation of future traffic volume.

For its finding, rejected by the Court below, "that the time has come when additional rail service at the port is required for the future development of the industries now or hereafter to be located there," the Commission had before it the following evidence upon which such finding was necessarily based:

1. That Lake Calumet port is the major deep water port facility of the Port of Chicago. (R. 291.)[39]

2. That tonnage anticipated to be handled through Lake Calumet port subsequent to the opening of the St. Lawrence Seaway would be in the range of 30,000,000 to 58,000,000 tons per year. (R. 1427.)

3. That rail traffic to and from Lake Calumet port during the coming year [1958] would be approximately 27,000 carloads, and could easily increase to 76,500 by 1962, possibly 115,000 by 1968 when the east side was developed, and anywhere from 250,000 to 350,000 carloads a year when both sides of the lake were completed. (R. 294.)

4. That when the port was completed there would be thirteen docking slips (R. 573); that by 1960 a third grain elevator and five additional transit sheds would have been constructed; that by 1967 the western side of Lake Calumet would have been completely developed; that it was entirely possible that the eastern side of Lake Calu-

39. We recognize that this finding was approved by the Court below. (R. 1409.) We respectfully contend the finding had no substantial support in the record.

met would have been developed by then (R. 576); that on the east side of the lake the largest commercial tank farm in mid-continental America would be built by 1964-1967. (R. 585.)

That this evidence was totally devoid of factual probability, and thus no evidence at all, as we then contended, is made apparent by the course of events since 1957.

We respectfully ask this Court to take judicial notice of: (1) the report of the Department of the Army, Corps of Engineers: Waterborne Commerce of the United States, 1964—Part 3, Waterways and Harbors, Great Lakes;[40] (2) Annual Reports of the Chicago Regional Port District (Lake Calumet Harbor) for the years 1963, 1964 and 1965;[41] and (3) the present physical facilities at Lake Calumet port,[42] to facilitate which we have provided a recent aerial photograph of Lake Calumet taken for a Consolidated High School District of the State of Illinois.[43]

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40. See *Tempel* v. *United States*, 248 U. S. 121, 130 (1918); *Jackson* v. *United States*, 230 U. S. 1, 18 (1913).

41. See *Chisholm* v. *Board of Public Education*, 240 F. Supp. 862, 863 (E. D. Pa. 1965) (report of Philadelphia Board of Education); *Sholter* v. *Claudy*, 108 F. Supp. 215, 216 (W. D. Pa. 1952) (records of state penitentiary); *Slack* v. *Atlanta White Tower System, Inc.*, 181 F. Supp. 124, 126 (D. Md. 1960) (annual report of state commission on Inter-racial Problems and Relations); *United States* v. *Anderson*, 109 F. Supp. 755, 757-58 (E. D. Wash. 1953) (report of state irrigation commission). The Annual Reports of the Port District are required by law. See Smith-Hurd, Ill. Rev. Stat. Ch. 19, § 173 (1965).

42. See *Granville-Smith* v. *Granville-Smith*, 349 U. S. 1, 14 (1955) (judicial notice of Virgin Islands tourist facilities at St. Thomas and St. John on the basis of Senate reports, magazines and books). See also, *The Best Foods, Inc.* v. *Welch*, 34 F. 2d 682, 685 (S. D. Ida. 1929) (judicial notice of virgin timberlands in Idaho); *Pacific Live Stock Co.* v. *Read*, 5 F. 2d 466, 468 (9th Cir. 1925) (judicial notice of aridity of portions of Western states); *Lisco* v. *McNickols*, 208 F. Supp. 471, 478 (D. Colo. 1962) (judicial notice of population concentrations and economic development in parts of Colorado); and *Sandidge* v. *Rogers*, 156 F. Supp. 286, 293 (S. D. Ind. 1957) (judicial notice of limestone deposits).

43. See Smith-Hurd, Ill. Rev. Stat. Ch. 122, § 11-1 to 11-10.

From the above sources[44] it is apparent that:

1. In terms of vessel traffic tons, Lake Calumet ranked 6th in shipping tonnage among the seven harbor facilities comprising the Port of Chicago in each year from 1957 to 1962, both inclusive, and rose to 5th in 1963 and 1964. In none of the years 1957 through 1964 did its shipping tonnage so measured ever exceed 4% of the total for the Port of Chicago as a whole. In 1964, Lake Calumet handled slightly more overseas and Canadian tonnage than did Chicago Harbor ("Navy Pier"), whereas Calumet Harbor and River (abutting Lake Michigan) handled more than twice as much overseas freight and five times as much Canadian traffic (excluding iron ore) as did Lake Calumet. Their grain traffic was about equal.[45] That Lake Calumet port was not in 1957-1959 and is not at present "the major deep water port facility of the Port of Chicago" cannot be disputed.

2. Vessel tonnage at Lake Calumet reached 1,385,098 tons in 1959, dropped to 702,000 tons in 1961, and rose to 1,294,522 tons in 1964. The totals for the entire Port of Chicago for those years were 39,923,667 tons in 1959; 36,623,446 tons in 1961 and 44,594,639 tons in 1964. In 1964, the total for the Port of Chicago exceeded for the first time the level reached in 1957—two years before the opening of the Seaway.[46] It can be at once observed that the anticipated tonnage (30 to 58 million tons) to be handled through Lake Calumet has not even begun to be realized. This disparity between prediction and fact makes apparent the total lack of factual basis for the prophecy.

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44. A copy of the Corps of Engineers report and the Annual Reports of the Port District have been lodged with the Clerk of the Court.

45. See Department of the Army, Corps of Engineers: Waterborne Commerce of the United States, 1964, Part 3—Waterways and Harbors, Great Lakes, pp. 42-43, 46, 48, 50, 53, 55-56, 59-61, 67.

46. See *supra*, footnote 45, at pp. 55, 67.

3. The number of freight cars moving in and out of Lake Calumet port were, in the following years ending at June 30:[47]

1963	18,022
1964	14,810
1965	16,201

Thus, the increase in rail traffic to and from Lake Calumet port predicted in 1957, has not in the intervening decade come even close to that "anticipated" for 1958, much less reached the levels forecast for subsequent years.

47. Annual Reports, Chicago Regional Port District 1963, 1964, 1965, all at p. 1. These figures confirm the evidence proffered by Rock Island in its Petition for Reconsideration and Argument of the Order of September 19, 1960 (R. 395), that the number of cars hauled to and from Lake Calumet Port industries were 18,604 in 1958, 16,315 in 1959 and 12,946 in the first nine months in 1960. (R. 419.)

4. The total failure of Lake Calumet to materialize as a major deep water port is vividly demonstrated by the comparison of the photograph received as an exhibit[48] during the testimony before the Examiner of Maxim M. Cohen, General Manager of the Port (R. 564), depicting a model of the Port as it would look when completed in 1967 (R. 576, 578), and an aerial photograph of Lake Calumet taken in April, 1966, for the Illinois Consolidated High School District 230, Palos Hills, Illinois. It is obvious that the "evidence" relating to the future of the port relied upon by the Commission was nothing more than "fantasy, speculation devoid of factual possibility"[49] and a liberal interpretation of "ambitions, past intentions, purposes, plans and schemes."[50]

48. Exhibit H-2. R. 573, 590. Package No. 8, Fol. 5075 (Orig. Rec.). The exhibit was not reproduced in the Transcript of Record. The exhibit also appeared on the first page of the Reply Brief of the applicant railroads in the proceedings in the District Court below. Package No. 11, Fol. 6795 (Orig. Rec.), not printed.

49. *American Airlines, Inc.* v. *CAB*, 192 F. 2d 417, 421 (D. C. Cir. 1951).

50. *ICC* v. *Piedmont & N. Ry.*, 51 F. 2d 766, 771 (W. D. So. Car. 1931).

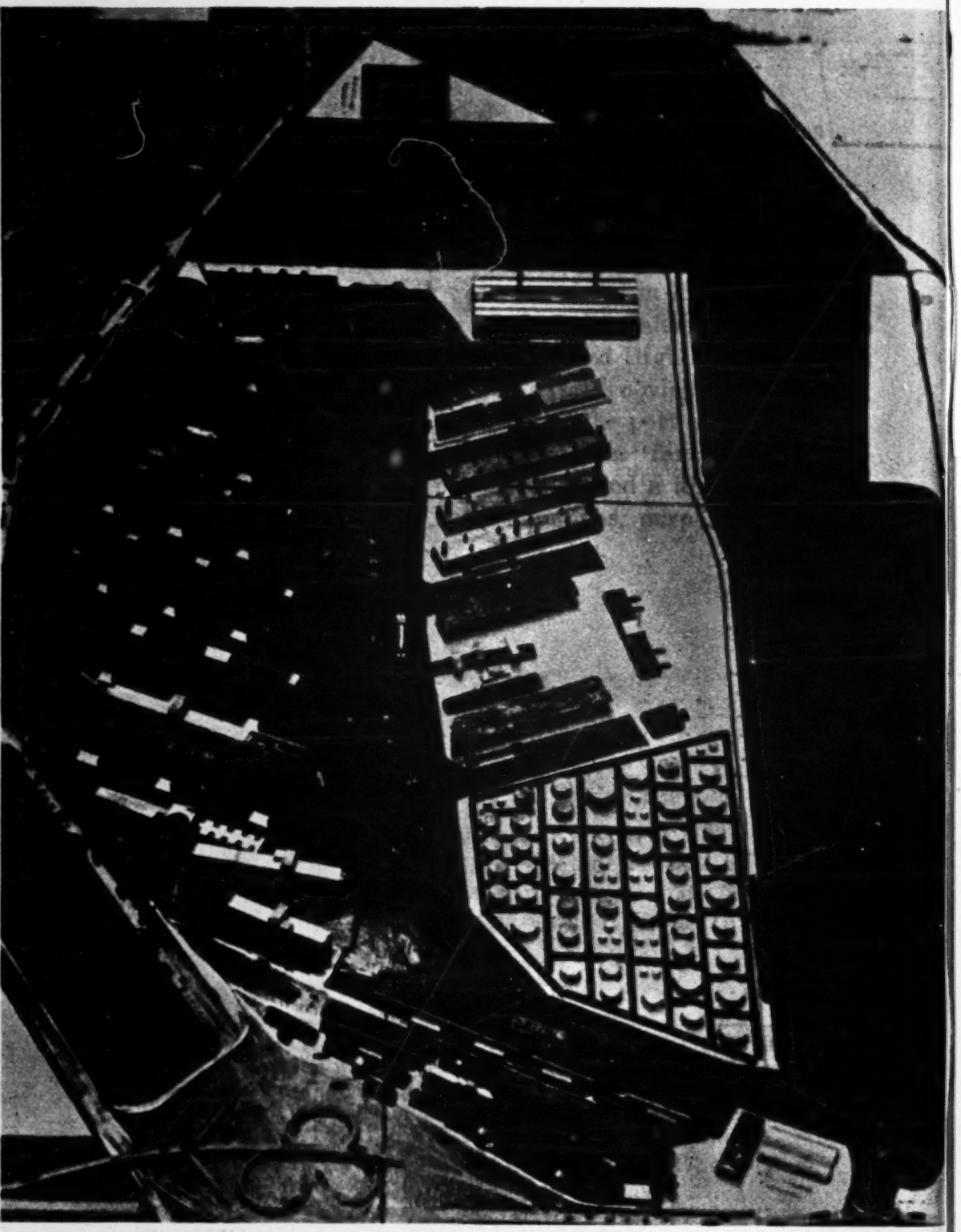

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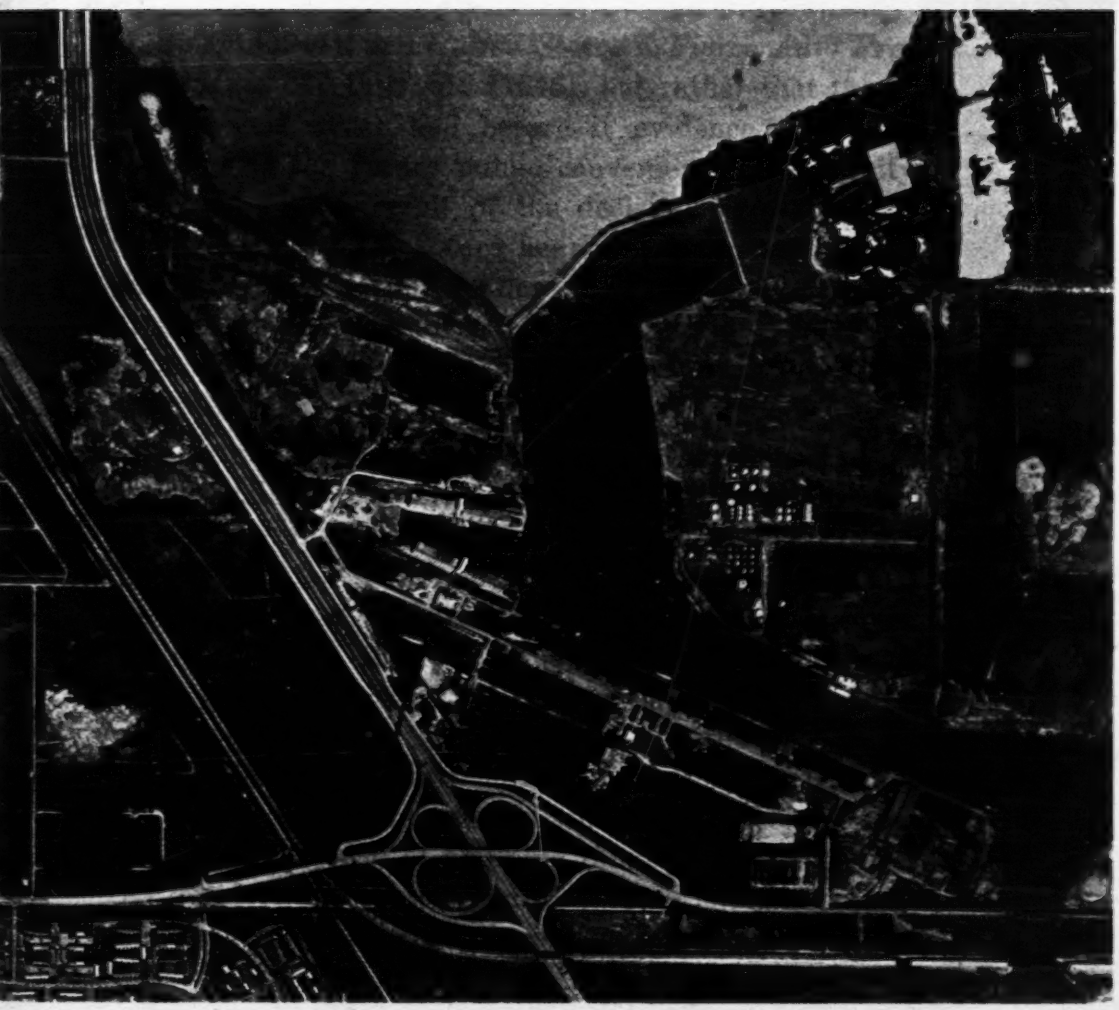
EXHIBIT NO. H-2 (Reduced)
Witness—M. M. Cohen



LAKE CALUMET, ILLINOIS

Chicago Aerial Survey photo for
Illinois Consolidated High School District 230,
Palos Hills, Illinois, April 1966.

The type of evidence, of which we have asked the Court to take judicial notice, would provide for the first time, a factual basis for an informed decision by the Commission regarding the future prospects of traffic via the St. Lawrence Seaway to the Port of Chicago generally, the future potential of Lake Calumet as a significant waterway port and, consequently, the need or lack thereof for additional rail service within the reasonably near future. The contention made herein is not that evidence, at one time sufficient, has become outdated by the passage of time, see *Interstate Commerce Comm'n* v. *City of Jersey City*, 322 U. S. 503 (1944), and *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U. S. 515 (1946), but rather that the Commission has *never* had before it evidence of probative value as to the future public convenience or necessity in this case. As a result of the decision below remanding the proceedings for future hearings, the Commission can now for the first time render a decision upon "the basis of present and past events and conditions," rather than upon "speculation devoid of factual premise,"[51] and should accordingly be granted that opportunity.

It is no answer to the foregoing, as counsel for the appellant industries attempted to assert at the oral argument below, that the expected increase in rail traffic, or for that matter the development of Lake Calumet itself, has not materialized because "we have single line service at the Port." (R. 1386.) In the first place, such a contention is factually in error because Lake Calumet has the services of two railroads, Rock Island and Nickel Plate. In addition, the record makes abundantly clear, as discussed above, that because of the wide variety of factors governing the level of shipping tonnage at Lake Calumet, the development of the facilities there, and the need for rail services—it cannot in logic be contended that the pres-

51. *American Airlines, Inc.* v. *CAB, supra*, 192 F. 2d at 421.

ent rail service is responsible for the overwhelming failure of any of the predictions of 1957 to come true.

Second, and more important, the contention is basically beside the point. If there *is* evidence to support it, it should be considered by the Commission. Indeed, if the decision below is affirmed, the Commission will be given the opportunity. That evidence, if there be such, together with the type of evidence of which we have asked the Court to take judicial notice, would obviously be relevant and necessary to a valid determination by the Commission. As we have said, contrary to the circumstances prevailing in 1957, *this evidence is now available.* Accordingly, the Commission can now render a decision based on fact rather than surmise.

III. THE COMMISSION'S REFUSAL TO AFFORD A HEARING ON THE APPLICATIONS FOR PERMISSION TO OPERATE WITHIN THE PORT DISTRICT WAS CONTRARY TO THE APPLICABLE STATUTES AND DEPRIVED THE INTERVENORS OF DUE PROCESS OF LAW.

A. Provisions of the Interstate Commerce Act and the Administrative Procedure Act Dictated That the Intervenors Be Afforded a Hearing on the Additional Applications.

In its original order, the Commission found that the applicants' operations within the Port District would constitute an extension of a railroad line. (R. 308.) In addition, the "Memorandum of Understanding" (Ex. H-29, R. 1132) submitted by the applicants proposed a "joint use of" railroad lines within the port. Therefore, the Commission's approval of these proposed operations necessitated consideration of both Section 1(18) (relating to the extension of rail lines) and Section 5(2) (a)(ii) (relating to "joint use" of rail lines) of the Interstate Commerce Act. Nevertheless, the Commission ignored its own observation that "orderly procedure dictates that all applications required to effect the entire plan be heard simultaneously, particularly, as here," (R. 268) and refused the repeated requests of Rock Island and Nickel Plate for a hearing on the additional authority sought by the applicants to operate within the port. (R. 349; 357; 392; 430; 488; 506; 545.)

It is acknowledged that there have been many applications under Section 1(18) where no questions as to rights of an existing carrier were raised, and in such unopposed cases, the Commission should have the discretion to act without a public hearing, as Congress has provided. Nevertheless, when the substantial investment of a railroad presently providing service is threatened, Sections 1(19) and 5(2)(b) must be construed to require a public hearing

with proper notice as to all issues, including supplemental matters arising from amendments to applications after a hearing.

In *Atchison, T. & S. F. Ry.*, 65 I. C. C. 386 (1920), the Commission found that it was not necessary to hold a formal hearing since no representations were made against abandonment by any interested person or locality. See also *Chicago, R. I. & P. R. R.*, 282 I. C. C. 344, 345 (1952). And a like disposition is appropriate in a Section 5(2) proceeding if there is no opposition. *Gulf M. & O. R. R. Trackage Rights*, 282 I. C. C. 689 (1952). On the other hand, research of the Commission's reports on this question reveals a consistent practice of assigning both Section 1(18) and Section 5(2) applications for formal hearings whenever protests indicate that the rights of existing carriers might be adversely affected.

The right of Rock Island and Nickel Plate to a hearing on the supplemental applications is reinforced by Section 5(a) of the Administrative Procedure Act (5 U. S. C. § 1004(a)), which reads, in part, as follows:

> "Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted."

The Administrative Procedure Act was enacted to preclude arbitrary action by administrative agencies. Issuance of the additional orders of the Commission without a further hearing violated that statute.

Neither *Woodruff* v. *United States*, 40 F. Supp. 949 (D. Conn. 1941) nor *Brotherhood of Locomotive Engineers* v. *United States*, 217 F. Supp. 98 (N. D. Ohio 1963), relied upon by the Commission and the railroad applicants, as support for the denial herein of the petitions for further

hearing,[52] is applicable authority. They both involved abandonment of rail service, and neither concerned the application of Section 5(2) of the Interstate Commerce Act.

The two remaining cases cited by appellants, *United States* v. *Pierce Auto Freight Lines,* 327 U. S. 515 (1946) and *ICC* v. *City of Jersey City,* 322 U. S. 503 (1944),[53] are equally inapposite. Neither case involved, as here, a refusal to re-open the proceedings for submission of evidence on issues broadened by additional applications.

B. The Commission Action on the Additional Applications Was More Than a Curing of Technical Errors.

As stated on page 34 of the Brief for Commission, a proposed extension of service may not be approved by the Commission unless it is shown that the new service "will be self-sustaining, or so nearly so as not unduly to burden interstate commerce." *ICC* v. *Oregon-Washington R. R. & Nav. Co.,* 288 U. S. 14, 37 (1933). The additional applications contemplated a further extension of applicants' service and a hearing should have been held to allow Rock Island and Nickel Plate to submit revenue and cost data on this issue as well as the impact on their investment in existing transportation facilities.

A reliable projection of revenues as well as costs is essential to provide evidentiary support for a "self-sustaining" finding. The prospective amount of traffic that can be generated is a critical factor in making a reasonable estimate of both revenues and costs. The Commission should have seized the opportunity to verify the traffic expectations testimony on the record against actual results. Instead, the Commission proceeded blindly to rubber stamp the re-

52. Brief for Commission, p. 32; Brief for Railroads, p. 25.

53. See Brief for Railroads, p. 26; Brief for Industries, p. 26; Brief for Commission, p. 37.

port and order dated October 5, 1959. This was an abuse of discretion.

Cross-examination at the hearing in respect of the unexecuted proposed lease (Ex. H-64, R. 1135, 793) as well as the unexecuted agreement for "joint use" of trackage within the Port District (the "Memorandum of Understanding" (Ex. H-29, R. 1132, 677)), did point up the fact that additional authority beyond the scope of the applications filed and notice for hearing would be necessary. However, because of the absence of prior notice on this aspect of the proceedings, it was unreasonable to expect Rock Island and Nickel Plate to present rebuttal evidence at the hearing, and was procedurally unfair. In its Petition for Reconsideration dated November 3, 1960 (R. 395), Rock Island advised the Commission that it was prepared to submit additional evidence at a further hearing to prove that the applicants' operation plan was improvident. (R. 395, 413.) Furthermore, in light of the failure of the Port District traffic and the Port District itself to expand in the intervening years, according to predictions made at the original hearing, Rock Island was prepared to demonstrate a destructive impairment of its present operation at Lake Calumet if applicants were allowed to carry out their plans.

Subsequent to the Commission's Report and Order (following the filing of the additional applications) of Sept. 19, 1960 (R. 383), the applicants repeatedly delayed in fulfilling their obligation to furnish executed copies of the pertinent agreements. When the revised rental formula was finally filed on November 27, 1961 (R. 450, 431), the Commission should have inferred that the traffic volume that had materialized would not support a higher rental rather than, as contended by appellants,[54] that the revised rental would yield more profit. See Commission Report of Nov. 26, 1962. (R. 504, 510.)

54. See letters from Illinois Central to ICC, R. 465, 486.

Accordingly, the contention that the later orders of the Commission corrected mere technical errors, is totally without support. These orders were based on acceptance of self-serving assertions beyond the hearing record (see R. 459-67), and reliance on speculative traffic estimates introduced at the hearing, although the actual traffic statistics could have been easily furnished.

The errors were more than technical, they went to the heart of the entire proceeding.

C. The Refusal to Afford a Hearing on the Additional Applications Deprived Rock Island and Nickel Plate of Due Process of Law.

Due process of law required a further hearing after prior notice of the material issues raised by the additional applications. The Court below unanimously concurred in this conclusion, and the matter cannot be seriously disputed. The proceeding should have included evidence on the extent to which Rock Island and Nickel Plate investment in track and other property serving Lake Calumet would be impaired if the existing traffic had to be shared with the six applicants. Under the circumstances, denial of the requests for further hearing resulted in an inadequate record.

The Commission granted a hearing for consideration of the original applications. This constituted a recognition on its part that a hearing was necessary. The Commission should not then have restricted the hearing to the original applications and denied a hearing on the broadened issues.

An existing carrier must be fully apprised of the evidence to support the applications and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can it exercise its right to make a proper showing. A hearing implies both the privilege of introducing evidence and

a right to have the decision determined in accordance with the evidence. *Baltimore & O. R. R.* v. *United States,* 264 U. S. 258, 265 (1924). As the Supreme Court said in *Akron C. & Y. Ry.* v. *United States,* 261 U. S. 184, 200 (1923):

> "... Whether a hearing was full, must be determined by the character of the hearing, not by that of the order entered thereon. A full hearing is one in which ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law, of the step asked to be taken."

The Commission here did not recognize and observe these requirements.

D. The Decision Below Was Unanimous on This Issue.

The Court below unanimously agreed that the Commission's orders on the additional applications should be vacated. Circuit Judge Edwards concluded that a hearing in relation to the applications for permission to operate *within* the Port District was dictated by statute and applicable case law and "as a matter of fundamental fairness mandated by the due process clause of the fifth amendment." (R. 1446.)

The majority concluded as follows:

> "... The failure to give plaintiffs timely notice before the hearing upon the final agreement was contrary to the Administrative Procedure Act and the rules which Section 1(18) of the Interstate Commerce Act states must be observed; these statutes reflect the constitutional requirements of due process.
>
> "It is our conclusion that the Commission's failure to give plaintiffs an opportunity to introduce evidence and to cross-examine witnesses in regard to the various managerial and economic aspects of the final plan, by

which they were bound, constituted a denial to them of due process of law." (R. 1420.)

E. A Rehearing by the Commission on All of the Issues Is Required.

The District Court determined that a rehearing is required upon all of the issues for the reason that the operation of railroad services up to the boundaries of the Port District cannot be considered apart from the railroad operations within the port. (R. 1420.) Further, the only purpose for which the new track would be constructed was to enable the applicants to operate within the District. A piecemeal approach to the issues involved in this case, as the Commission followed below, cannot be countenanced. Obviously, evidence relating to the need for additional rail service within the port is not severable from that relating to the need for such service up to the port. In addition, the profitability of the entire proposed operation will depend upon costs and revenues both within and without the Port District. Accordingly, and in view of the decision below on all of the issues, a remand for a full hearing before the Commission was undoubtedly required.

CONCLUSION.

It is respectfully submitted that the opinion of the Court below was correct under law and consonant with the record before it, and should accordingly be affirmed.

Respectfully submitted,

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September 23, 1966.

APPENDIX.

Section 1(19) of the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U. S. C. 1(19) provides:

> The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this chapter shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

Section 1(20) of the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U. S. C. 1(20) provides:

> The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the

issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest, and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

SUPREME COURT OF THE UNITED STATES

Nos. 15, 17 AND 20.—OCTOBER TERM, 1966.

Illinois Central Railroad Company et al., Appellants,
15 *v.*
Norfolk and Western Railway Company et al.

Calumet Harbor Terminals, Inc., et al., Appellants,
17 *v.*
Norfolk and Western Railway Company et al.

United States and Interstate Commerce Commission, Appellants,
20 *v.*
Norfolk and Western Railway Company et al.

On Appeals From the United States District Court for the Northern District of Ohio.

[November 14, 1966.]

MR. JUSTICE CLARK delivered the opinion of the Court.

This is an appeal from the judgment of a three-judge District Court, 241 F. Supp. 974, setting aside orders of the Interstate Commerce Commission, 307 I. C. C. 493, 312 I. C. C. 277, 317 I. C. C. 502, which granted the applications of seven railroads[1] to provide additional rail service to the Lake Calumet Harbor Port near the

[1] Illinois Central Railroad Company; Pennsylvania Railroad Company; Chicago South Shore and South Bend Railroad; Belt Railway Company of Chicago; The New York Central Railroad Company; and the Indiana Harbor Belt Railroad Company. The Michigan Central Railroad Company sought additional trackage approval but had not signed a proposed lease with the Port District as the other appellants had.

southern limits of Chicago, Illinois. The service was to be provided through the construction of a single line of track into the Chicago Regional Port Authority for the joint use of the seven railroads. At present the port is served directly by only one railroad, appellee Chicago, Rock Island and Pacific Railway Company (Rock Island). Appellee, New York, Chicago and St. Louis Railroad Company ("Nickle Plate"),[2] has facilities on the east side of Lake Calumet which has been reserved for future commercial development, but at present their facilities do not reach the port. The court, with one judge dissenting, rejected as not having "ample support" in the record, the findings of the Commission that the public convenience and necessity required the additional service applied for by the seven roads. It further found, unanimously, that the requirements of due process were violated by the Commission in its refusal to give Rock Island and Nickle Plate a hearing before approving a nonexclusive agreement, subsequently executed between the applicant roads and the Port Authority, covering the use of the latter's facilities. The court ordered a new hearing on the entire proceeding, one judge concluding that such hearing should be limited to the subsequently executed nonexclusive use agreement. We noted probable jurisdiction, 382 U. S. 913, and reverse the judgment.

I.

Background of Lake Calumet Harbor Port.

Lake Calumet Harbor Port is one of seven facilities within the Port of Chicago available for the handling of water-borne freight. It is a shallow lake approximately

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[2] The Nickle Plate has merged into the Norfolk and Western Railroad Company since this proceeding began.

two miles in length and covers approximately 1,250 acres. It is accessible by water from Lake Michigan via the Calumet River into the heart of the Chicago switching district, a distance of some six miles.

As early as 1880 one of the Pullman companies constructed trackage that first brought rail service to Lake Calumet. Pullman reserved some 300 to 500 acres for the development of a harbor and later donated some acreage to the United States for the development of a turning basin. Comprehensive plans for dredging Lake Calumet harbor and the filling of submerged lands were prepared in 1916 by an engineer for the City of Chicago. In 1917 Pullman waived riparian rights to some four miles of Lake Calumet shoreline to the City of Chicago and in 1935 gave additional land to the United States for the purpose of widening the Calumet River.

In 1947 the Illinois Central, an appellant here, attempted to enter the port area. Pullman and two of the seven appellants here, New York Central and the Belt, opposed the application which was addressed to the Illinois Commerce Commission. In 1949, during the pendency of the proceeding, Rock Island acquired the common stock and certain industrial property of Pullman for $2,200,000. Rock Island then entered the proceedings in opposition to Illinois Central. The application of the latter was approved by the Illinois Commerce Commission but the Circuit Court of Cook County rejected it and the Supreme Court of Illinois affirmed in 1953. *Chicago, Rock Island and Pacific R. R.* v. *Illinois Commerce Commission, ex rel. Illinois Central R. R.*, 414 Ill. 134.

The Interstate Commerce Commission in approving the acquisition of Pullman by Rock Island—over the objections of Illinois Central and the Belt Railway Company, each of whom also sought to acquire Pullman or

a portion of its trackage on the lake—imposed certain conditions on Rock Island designed to guarantee fair practices, assure nondiscriminatory handling of the traffic of other railroads to and from the lake and guarantee the mutuality of traffic and operating relationships theretofore existing between Pullman and the other roads. Rock Island, however, continued to be the only line providing direct service to the port.

The Chicago Regional Port District was created as a municipal corporation by the State of Illinois in 1951. Its purpose was the development of Lake Calumet into a major deep water port facility for both domestic and import-export traffic via the St. Lawrence Seaway. In 1954 the Port District declared by resolution that the public's, as well as the port's interest, required that its trackage be accessible to as many railroads as possible. In 1955 the Port District acquired the lake and some adjoining property from the City of Chicago and began dredging the lake and constructing port facilities at its southern end; it also built 14 miles of railroad yard "hold" tracks in the port, docks, two 6,500,000-bushel grain elevators, three transit sheds comprising 300,000 square feet of space, a back-up warehouse with 200,000 square feet of space and streets. These facilities cost $24,000,000 and were paid for by the sale of Port District revenue bonds. By contract with the Port District the Rock Island operates therein over the trackage of the Port District and also serves the Calumet Harbor Terminal, Inc., a private harbor facility. No other railroads reach the port on their own tracks. The Nickle Plate is the nearest rail facility. As previously noted, its trackage on the east side of the lake has been reserved for future development by the Port District. Any railroad wishing to service the port must use the facilities of Rock Island.

II.

The Applications Before the Commission.

On October 22, 1956, the appellants, Illinois Central Railroad Company and the Pennsylvania Railroad Company, requested authority from the Commission under the provisions of 49 U. S. C. § 1 (18) to construct 1.431 miles of new track that would connect their lines to the present trackage of an affiliate of Illinois Central that pass near Lake Calumet's southwestern shore. Similar applications were subsequently filed by the Chicago South Shore and South Bend Railroad, the Belt Railway Company of Chicago, the Michigan Central Railroad Company, the New York Central Railroad Company and the Indiana Harbor Belt Railroad Company. All of the applicants sought to operate directly to and from the Lake Calumet port, rather than using the facilities of the Rock Island. The latter, as well as the Nickle Plate, requested and was given leave to intervene as were other parties.[3] The Rock Island and Nickle Plate were the only objectors, the remaining intervenors all supporting the applications.

The original applications of the seven railroads did not specifically request authority from the Commission to operate over the Port District's tracks. It appears that appellants were under the impression that formal Commission authority was not necessary because of the fact that Rock Island was currently operating without it. Nevertheless, the applications covered the entire plan of operations proposed by appellants, including activity within the Port District as well as an unexecuted agreement covering the leasing of the Port District fa-

[3] Others included: The Secretary of Agriculture, the Port District, the Chicago Board of Trade, the Chicago Association of Commerce and Industry, and two private companies operating on the lake, Calumet Harbor Terminal, Inc., and North Pier Terminal Company.

cilities which was attached to the application as an exhibit. This lease was before the Hearing Examiner during the 12-day joint hearing he conducted and was the subject of testimony and consideration. The appellants advised, and the Hearing Examiner concluded, that the appellants sought approval to operate within the Port District, as well as authority for the track extension. Accordingly, the Hearing Examiner recommended to the Commission that the entire project of the appellants be approved.

On October 5, 1959, the Commission adopted the Hearing Examiner's recommendations but ruled that the applicants should file supplemental applications covering their proposed operations within the Port District as provided in the proposed lease with the District. The Commission discussed the lease and indicated that it was satisfactory. It did, however, feel that the exclusive right of operation clause should be eliminated. The Commission also ruled that Rock Island's service to Calumet Harbor Terminal, Inc., was not to be disrupted and that every industry located at Lake Calumet Harbor was to have direct rail service, not only from the applicants but the Rock Island and Nickle Plate, if they so elected.

In April 1960, the appellants, pursuant to the Commission's requirement, filed supplemental applications for specific authority to operate within the Port District. The proposed lease covered by these applications eliminated the exclusionary provisions to which the Commission had objected. Despite the request of Rock Island and Nickle Plate for a hearing on the new lease the Commission found that the "technical deficiency" existing in appellants' original applications had been corrected by the filing of their supplemental applications; that the record of the previous hearing was adequate to support

approval of the entire proposal of the appellants; and the applications, as supplemented, were approved.

In June 1961, however, the appellants and the Port District found it necessary to amend their operating agreement and appellants filed a second supplemental application asking for approval of the same. This agreement modified the one previously approved by the Commission. The old agreement had provided for a 5% annual rental for the use of the Port District's rail facilities based upon the valuation of the latter, but not to exceed $2 per car, loaded or empty, including locomotives. The new agreement provided for a flat charge of $2 for each loaded freight car; it also specifically eliminated industry owned tracks within the Port District from the agreement; and provided that it did not affect the right of Rock Island to operate in the Port District nor grant any exclusive privilege to the appellants. The Commission, after once again denying appellees' request for a hearing, approved this final agreement on November 26, 1962. The Commission found that the changes merely clarified the rights and responsibilities of the parties. As to the rentals it found that "rentals may generally be considered reasonable where, as here, the facts of record disclose that non-affiliated parties, after bargaining at arm's length, have entered into an agreement under which increased service will be offered to the public, all parties to the agreement will benefit financially, and the intervenors' ability to continue to serve the public will not be impaired."[4]

III.

Proceedings in the District Court.

The Rock Island and Nickle Plate then filed this suit seeking to enjoin the Commission's orders and the three-judge District Court vacated the orders on the grounds we have stated.

[4] 317 I. C. C. 502, 505.

The court found that it was faced with two basic problems: (1) whether there was "substantial evidence" to support the order of the Commission and (2) whether the refusal of the Commission to have a hearing on the lease agreement between the applicants and the Port District denied Rock Island and Nickle Plate due process of law.

With respect to the first problem the court found "substantial support" for some of the "important findings" of the Commission. However, it found that the record did not "offer ample support" for certain of its conclusions. These conclusions appeared to have been drawn by the Commission from the prior findings which the court had found to have "substantial support" in the record.

On the supplemental application for authority to operate within the Port District the court held there was insufficient evidence to support the order of approval; that the rental under the final contract was materially different from the provisions of the original plan and bound the Rock Island and Nickle Plate to operate under the same condition without affording them the right of a hearing. By a divided court it ordered a complete rehearing on all issues. We cannot agree with either the findings of the District Court or of their disposition of the case.

IV.

At the outset the Commission and the appellant railroads contend that the court did not apply the correct standards in reviewing the Commission's action. As we have noted, the court did reject certain "conclusions" of the Commission, as above indicated, with respect to the public convenience and necessity for additional rail service to Lake Calumet port on the ground that they did not have "ample support" in the record. The test

on judicial review is, of course, whether the action of the Commission is supported by "substantial evidence" on the record viewed as a whole, 5 U. S. C. § 1009 (e)(5). Substantial evidence is "enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." *Labor Board* v. *Columbia Enameling and Stamping Co.*, 306 U. S. 292, 300 (1938). A careful reading of the opinion leads us to conclude that the court was applying the test of substantiality. Indeed, at four separate places in the opinion it uses the term "substantial evidence" as being the necessary requirement. As unfortunate as it is that the "ample support" language crept into the decision, we do not believe that the court was creating a "novel formulation" but rather inadvertently used the "ample support" terminology merely to meet the same language in the dissent referring to the conclusions of the Commission.

We have concluded that the court erred in setting aside the conclusions of the Commission. The Act authorizes the issuance of certificates such as the ones sought here when the Commission finds that the future public convenience and necessity will require additional railroad service. 49 U. S. C. § 1 (18). This Court has repeatedly held that if a railroad, voluntarily proposing the extension of its lines, can show that its proposal "either presently or in the reasonably near future will be self-sustaining, or so nearly so as not unduly to burden interstate commerce, the Commission may issue a certificate authorizing the proposed line," *Interstate Commerce Commission* v. *Oregon-Wash. R. & Nav. Co.*, 288 U. S. 14, 37 (1933). The Commission, however, "must be convinced that the proposed venture will not drain the railroad's resources and disable it from performing those duties of public service under which it then rested, with consequent detriment to the public in

the matter of service and rates." *Ibid.* Also see *Texas and P. R. Co.* v. *Gulf C. & S. F. R. Co.*, 270 U. S. 266, 277 (1926); *Chesapeake & O. R. Co.* v. *United States*, 283 U. S. 35, 42 (1931). Rock Island and Nickle Plate contend that the "evidence [of appellants] adduced before the Commission was so totally devoid of factual possibility as to be no evidence at all." As we read it, the evidence as to the future possibilities of the port was somewhat conflicting. The Commission, in keeping with its duty, resolved this conflict. Indeed, the findings of the Commission, which were upheld by the District Court, completely refute the Rock Island and Nickle Plate claims. Among the findings approved by the court[5] are the following: The port was "the major deep water port facility of the port of Chicago"; with "unparalleled access" to barge, rail, lake steamer and motor transportation and "complete access to ocean transportation" in the immediate future; with 71,490,510 tons of water-borne traffic in 1955 and with "material increases"[6] in tonnages predicted for the future from among an estimated 600 to 900 vessels coming to the Chicago port each season, that "will necessitate a sub-

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[5] *Norfolk and Western R. R. Co.* v. *United States*, 241 F. Supp. 974, 977.

[6] The testimony was that rail traffic to and from the port in 1960 would be 27,000 carloads which could easily increase to 76,500 carloads in 1962, 115,000 carloads in 1968 and anywhere from 250,000 to 350,000 carloads a year when both sides of the lake are completed. There was also much testimony as to grain shipments. The seven States of Indiana, Illinois, Iowa, Missouri, Kansas, Nebraska and Colorado in 1956 produced 43% of all the wheat and 51% of the corn grown in the United States. The existing disparity in rates will divert much grain from Atlantic and Gulf ports for movement via Chicago and the St. Lawrence Seaway. Service to the port by one railroad does not appear adequate since the railroads serving the midwest grain-producing States terminate in Chicago and have extensive switching and classification yards which could be utilized.

stantially broadened railroad service into and out of the Lake Calumet port"; that appellants' combined yard capacity was 61,601 cars, more than 12 times that presently available at the port; that appellants' routing will be "more direct," entail less handling, expedite shipments and be less expensive than the present operation of Rock Island and, finally, that it was "imperative . . . that at the beginning of this new era of development a plan and system of handling the transportation needs of the port be established which will assure the type of service that is expected and will provide for steady progress and expansion." We believe that these findings, in the light of others not overturned by the District Court, are sufficient to sustain the Commission's action in issuing the certificates.

Moreover, we believe that the District Court erred in striking down the conclusions of the Commission. These conclusions[7] included: That consideration of the whole record warranted the finding that the applications should be granted; granting them would result in greater rail competition, better service, greater car supply and lower rates for the industries served by the port; appellants would be "on a par" with the Rock Island in solicitation of grain traffic and having control of their cars could return empties in a fast shuttle service to country elevators without interchange with Rock Island; the time has come when additional freight service is required for the future development of the Port District; better service can be given through elimination of delays, by single line hauls or more direct hauls; a single trunkline railroad service would be detrimental and a hindrance to the development of the harbor, and although the port is served by some 100 common carrier trunklines the Rock Island is the only one presently serving the port; the future convenience and necessity must be given "a higher

[7] 241 F. Supp. 974, 979.

value" than the present convenience and necessity; the proposed construction either presently or in the reasonably near future is necessary to meet a public need and will be reasonably profitable; and, finally, considering the expansion program at the port and the increased rail traffic to be made available the Commission is "of the opinion that the additional service is warranted." As we have said, these conclusions were largely based upon previous Commission findings which the District Court approved. The Commission's function is to draw such reasonable conclusions from its findings that in its discretion are appropriate. As we said in *Consolo* v. *Federal Maritime Comm'n*, 383 U. S. 607, 620 (1966), "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." It is not for the court to strike down conclusions that are reasonably drawn from the evidence and findings in the case. Its duty is to determine whether the evidence supporting the Commission's findings is substantial, *Universal Camera Corp.* v. *Labor Board*, 340 U. S. 474 (1951). Having found that there was substantial support in the record for the Commission's findings as to the port's future potential and the necessity of providing competitive rail service at the outset of the port's development, it was not the District Court's function to substitute its own conclusions for those which the Commission had fairly drawn from such findings. Its agreement with the controlling subsidiary findings required the District Court to sustain the Commission's conclusions.

V.

The court also erred, we believe, in ordering a new hearing in the proceedings. It found that the Commission's order issuing a certificate of public convenience and necessity to operate within the Port District was not

supported by sufficient evidence and violated due process in that a hearing was not afforded the appellees thereon.

As we view the original applications of the appellants they proposed "to extend their operations to serve the Lake Calumet Harbor District near Chicago, Cook County, Illinois . . . future industries, elevators, warehouses, docks and piers in the Calumet Harbor Port area." The prayer was that "your Commission issue a certificate of public convenience and necessity authorizing the construction and operation for which authority is herein sought." [8] The proceeding came on for a hearing before the Hearing Examiner on September 30, 1957, and counsel for the Rock Island stated for the record that his understanding was "the issue in this case is that all applications are for the purpose of handling *import* and *export* business only *to and from* the Port District Harbor of Chicago . . . ." (Emphasis supplied.) And counsel for the appellants stated that the plan was "to handle interstate business to and from the area over which the port has jurisdiction. We have no such limitation at all as to import or export trade." Likewise, the "Return to the Questionnaire" executed by appellants stated: "The line proposed to be constructed and operated will receive material revenue from freight traffic to be handled to and from industries, elevators, warehouses, docks and piers, presently operating in the Calumet Harbor Port area, in addition to those facilities to be constructed with the further development of this area." [9] To make it crystal clear paragraph 10 of the same answer to the questionnaire stated:

"The Lake Calumet Port District which the proposed line will serve is currently served by the Chi-

[8] Application of Illinois Central, Pennsylvania, and Chicago South Shore and South Bend railroads filed October 19, 1956, with the Interstate Commerce Commission.

[9] Return of Illinois Central, Pennsylvania, and the South Shore, p. 5.

cago, Rock Island and Pacific Railroad Company by virtue of its acquisition of the Pullman Railroad Company, through purchase of capital stock, and lease by the former of the railroad property of the latter approved and authorized by the Commission in Finance Docket No. 16252, Pullman Railroad Company Control, decided November 17, 1949."

The other applications had similar allegations and the other appellants' questionnaire returns contained like statements. Moreover, the answers filed on May 16, 1957, by Rock Island and Pullman to the applications, addressed themselves solely to the proposition that "applicant's extension of its line of railroad and operations through trackage rights to serve territory [the Port Authority] heretofore served exclusively and adequately by petitioners cannot be supported by public convenience and necessity, could mean only a duplication of rail service and would create unsound and uneconomic conditions in transportation."

As we read the record before the Hearing Examiner the case was tried on the theory that the applications included the proposed operations within the Port District. During the presentation of appellants' evidence objection was made to the introduction of the proposed lease between appellants and the Port District on the grounds that it was beyond the scope of the application. The Hearing Examiner overruled the objection. The testimony of virtually all of the appellants' witnesses was directed to some phase of the operations of the Port District. It should also be noted that the appellees sought to rebut this testimony in voluminous detail. For example, 40 pages of the record details the testimony of Mr. R. C. Davidson, a witness for Rock Island. His testimony is devoted to Rock Island's operation in the United States with specific reference to the Port District.

It compares its operation in the Port District with that proposed by the appellants and answers in detail the statistics of the appellants as to charges, rates, switching problems, etc., involved in operations within the Port District. Page after page of prepared statistics on the costs, profits, etc., of the proposed operation were included in the testimony, together with forecasts as to the impact of the same, if permitted, on Rock Island's operations. Another witness for Rock Island, Professor Marvin L. Fair, testified for some 15 pages on the potential of the Port District. His research on the same was in great depth and included comparisons with other Great Lakes ports; estimated traffic of the Port District, including iron ore, grain, and general cargo; physical conditions of navigation at the port; the effect of tolls; the capacity of the Welland Canal (in the St. Lawrence Seaway) and its impact on the port; the efficiency of the port facilities; established movement of exports and imports; the effect of political, military, and economic conditions at home and abroad and the adequacy of Rock Island's service.

The record establishes beyond a doubt that the appellants were in fact seeking Commission approval of the entire project. Their offering of the unexecuted, proposed contract into evidence is one of many indications of this fact. The Hearing Examiner specifically noted, at the time the contract was received in evidence, that its approval by the Commission was necessary in order for the appellants to serve the Port District as they proposed. It would, indeed, have been a futile act for the appellants to seek and attain approval to extend their lines to the Port District but not be able to enter it!

It is true that appellees objected to the introduction of the proposed agreement because they felt, rightly so, that the application which the appellants had submitted was

not technically broad enough for the authority they sought. The Hearing Examiner overruled them and they were obliged—as they did—to offer their evidence on the matter. When the question came before the Commission for decision, it ruled that the applications were technically deficient and permitted the parties to correct the same through the filing of supplemental applications. At no time did the Commission find that the proposal to operate within the Port District had not been adequately explored and examined. Rather, a careful reading of the Commission's entire opinion leads us to the opposite conclusion. At every stage of the proceedings before the Hearing Examiner and also before the Commission, operations of the appellants within the Port District were considered an integral part of the overall plan which they submitted.

The ruling of the Commission that the supplemental applications should be considered in "conjunction with the original application," did not, in our view, deprive appellees of due process of law. When appellees requested a full hearing on the supplemental application the grounds they alleged were that they were adequately serving the port; that they were prepared to spend further sums of money in the construction of facilities to serve it; that they were entitled to retain the traffic of the Port District; that there was no adequate reason for extension of the railroad lines of appellants into territory heretofore served exclusively by appellees; and that the extension of the railroad line of appellants was not justified by public convenience and necessity. As the Commission itself found, "Examination of the record discloses that these are the same arguments and contentions that were set forth in protestants' original briefs, exceptions to the examiner's proposed report, in their petitions for reconsideration, and in their oral arguments." *Illinois*

Central R. R. Co. Construction and Trackage, 312 I. C. C. 277, 280.

The changes in the proposed lease agreement which the Commission approved without a further hearing involved the removal of the "exclusive right to operate within the Port clause," which that document had given the appellants, and the formula for determining the annual rental to be charged by the Port District. As to the former, it can hardly be maintained that this worked a hardship or detriment upon the appellees. The removal of the clause, in fact, made certain that appellees were not precluded from continuing their present operations. As to the rental clause, it will be remembered that the original proposed agreement provided for 5% annual rental based on the value of the land and tracks, but not to exceed $2 per car. This was changed in the first supplemental application to a charge of $2 per car, loaded or empty, including locomotives. The final contract provided for $2 for each loaded freight car which was much more favorable to the appellants than either of the former clauses. Moreover, the final charge compared favorably to other per-car rates previously approved by the Commission. In the light of these considerations, as well as the fact that appellees were invited and refused to sit in on the negotiation of the contract; had ample opportunity and did present their evidence as to the reasonableness of the charge for the use of Port District property; were, and are, in nowise bound by the contract; and finally, the insignificance of the changes in the final agreement compared with the former ones, we are led to conclude that appellees were not entitled to another hearing.

Appellees also insist that a new hearing be held so that evidence of "present conditions" could be presented to the Commission rather than "speculation." It is

true that this case has been pending for 10 years but this, rather than being a reason for holding additional hearings, operates to the contrary. We have concluded that the orders of the Commission were proper under the circumstances. We have found substantial support for their actions. Accordingly, it is our view that this matter be concluded.

The judgment is therefore reversed and the case is remanded with directions to sustain the Commission's orders.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

Nos. 15, 17 AND 20.—OCTOBER TERM, 1966.

Illinois Central Railroad Company et al., Appellants,
15 v.
Norfolk and Western Railway Company et al.

Calumet Harbor Terminals, Inc., et al., Appellants,
17 v.
Norfolk and Western Railway Company et al.

United States and Interstate Commerce Commission, Appellants,
20 v.
Norfolk and Western Railway Company et al.

On Appeals From the United States District Court for the Northern District of Ohio.

[November 14, 1966.]

MR. JUSTICE BLACK, dissenting.

The District Court set aside an order of the Interstate Commerce Commission on the ground that the evidence failed to support its findings of fact. I dissent from the Court's reversal of that holding. In *Universal Camera Corp.* v. *Labor Board*, 340 U. S. 474, 488, it was said that "Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, in-

cluding the body of evidence opposed to the Board's view." In the case here the District Court found that it could not conscientiously support the Commission's findings and I would affirm its judgment, adhering to the principles so firmly announced in *Universal Camera, supra.*